Supreme Court, U.S.
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No. 94 259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LAWRENCE F. BROWN, M.D.,
Petitioner,
vs.
NATIONAL MEDICAL ENTERPRISES,
NME HOSPITALS, INC. and KEVIN JENKINS, D.O.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

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96PP

QUESTIONS PRESENTED

1. Where a black radiologist brings suit against a hospital for terminating his clinical privileges without a hearing, where the trial court grants summary judgment on six causes of action, and where the state appellate court upholds the trial court's grant of summary judgment — although the respondents admit terminating him without a hearing, *no* evidence exists to the contrary and state court's controlling decisions have long held clinical privileges to be fundamental and vested rights and not removable except by a hearing — does that state-action-by-judiciary violate the Fourteenth Amendment's due process and equal protection guarantees?

2. Where the appellate court prior to oral argument issued its "Tentative Opinion" which contained the fiction that no termination occurred and also the fiction that state law requires no hearing, does the appellate court's refusal of petitioner's proffer of corrections of that Tentative Opinion via his Supplementary Letter-Brief, plus the court's 15-minute limit on oral argument, violate due process and equal protection?

3. Does the stifling by summary-judgment of the petitioner's then-pending Motion to Compel Discovery on the race issue, constitute further state action invoking the Fourteenth Amendment's due process and equal protection clause?

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Carl Joachim Friedrich, "Confiscations,"
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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

LAWRENCE F. BROWN, M.D.,
Petitioner,
vs.
NATIONAL MEDICAL ENTERPRISES,
NME HOSPITALS, INC. and KEVIN JENKINS, D.O.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Lawrence F. Brown, M.D.[1] respectfully seeks Certiorari to review the opinion of the California Court of Appeal, Fourth Appellate District, Division Two.

OPINIONS AND ORDERS BELOW

The February 22, 1994, Court of Appeal, Fourth Appellate District, Division Two, opinion is reproduced herein as Appendix A. The March 23, 1994, modification of opinion and denial of petition for rehearing are reproduced herein as Appendix A, pages A-27 and A-28. The May 11, 1994, denial of petition for review by the California Supreme Court is reproduced herein as

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[1] All the parties to this proceeding are listed in the caption of this petition.

Appendix B. The trial court's orders and judgments are reproduced herein as Appendix C.

JURISDICTION

The judgment of the Court of Appeal of California, Fourth Appellate District, was entered on February 22, 1994. The Court of Appeal denied a timely Petition for Rehearing on March 23, 1994. The California Supreme Court denied review on May 11, 1994. This Court has jurisdiction under 28 U.S.C.A. § 1257(a), which jurisdiction petitioner invokes.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment of the United States Constitution: Section 1

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Health Care Quality Improvement Act of 1986, 42 U.S.C.A. sections 11111-11152 which in part states:

> The Congress finds [that the] increasing occurrence of medical malpractice and the need to improve the quality of medical care . . . warrant greater efforts than those that can be undertaken by any individual State. [There is an] overriding public concern that the professional review action . . . meets all the standards

> specified[. The physician must be given] adequate notice and hearing procedures [and] such other procedures as are fair to the physician . . . [and the hearing must be held] before an arbitrator mutually acceptable to the physician and the health care entity . . . . In the hearing the physician involved has the right . . . to representation by an attorney . . . of the physician's choice; to have a record made . . . to call, examine, and cross-examine witnesses, [and] to present evidence . . . regardless of its admissibility in a court of law, and . . . receive the written recommendation . . . and written decision . . . . (§ 11112) (Text of 42 U.S.C.A. §§ 11101-11112 appears herein as Appendix D.)

Corporate Bylaws of Respondents: Article VIII, section 7:

> Contract professionals. Any person who has a contractual relationship with this corporation which requires Medical Staff membership and privileges may have such membership or privileges terminated or restricted only in accordance with the hearing and appeals procedures to which he would otherwise be entitled, unless otherwise stated by contract. (Exhibit 10) (CT 1075 line 13 to CT 1076 line 7)

Medical Staff Bylaws of Respondent: Bylaw Article 3.2-3: (CT 1076 lines 8-18)

> A medico-administrative officer [is an officer] with clinical responsibilities, . . . The Medical Staff membership and clinical privileges of any medico-administrative officer shall not be contingent upon his continued occupation of that position . . .

STATEMENT OF THE CASE

Respondents, national hospital chain National Medical Enterprises, Inc., subsidiary corporation NME Hospitals, Inc. dba Doctors Hospital of Montclair, and the said hospital's Chief of Medical Staff Kevin Jenkins, D.O., severed petitioner-radiologist from his set of clinical privileges in radiology and nuclear medicine without cause and without a hearing. Following that expulsion from the Radiology Department, petitioner brought suit, the amended complaint (CT 1-21)[2] alleging six causes of action for the expulsion. The complaint includes counts for acts of termination and nullification of those privileges as follows:

1. breach of fiduciary duty and nullification of the fundamental and vested grant by hospital to physician of clinical privileges,

2. interference with medical specialist's practice of his profession,

3. violation of the California civil rights Unruh Act prohibiting racial discrimination,

4. breach of covenant of good faith and fair dealing based on an implied and oral agreement confirming the bylaw tenuring of the physician,

5. violation of the common law of antitrust of California, and

6. breach of covenant of good faith and fair dealing of an implied and oral post-expulsion agreement falsely promising and assuring petitioner that he would have the replacement committee's "inside track" to his restoration.

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[2] CT refers to the Clerk's Transcript.

Answer was filed. Some discovery ensued. Respondents filed a motion for a protective order; petitioner filed a motion to compel discovery, especially on the issue of race discrimination.

Respondents moved for summary judgment on March 24, 1991. Petitioner filed opposition to all aspects of the motion except to concur that respondents did indeed award successor-Director Dr. Shapiro an exclusive contract. The trial court granted summary judgment, despite and while petitioner awaited the setting of date for hearing the discovery motions by the specially appointed retired judge — and despite plaintiff's pending motion to compel discovery and plaintiff's motion for continuance of the summary judgment hearing. Plaintiff filed notice of appeal on September 9, 1991.

Petitioner is an African American physician who came on staff at the respondent hospital in 1975. He held a full complement of clinical privileges in Radiology and Nuclear Medicine. (CT 1055 lines 9-14, CT 1073 lines 26-27) He began as co-director of the Radiology Department in 1977. At the beginning he was counseled by his co-director, Dr. Robert Sturr, Jr., never to forget that here, you are "a black man in a white man's society." (CT 1072 lines 17-21)

"I had been recommended for the radiology department by Dr. William Filler. It was only after Dr. Filler let his intended retirement be known, that the direct moves were made to oust me and breach my tenure at the hospital." (CT 1074 lines 2-4, CT 1311 lines 12-15)

In the last year before termination appellant's Department was found to have no demerits — a perfect score — by the state's joint hospital accreditation agency. (CT 1073 lines 22-25, CT 1120 lines 15-20) He had never been brought up for corrective action. (CT 1120 lines 6-10) He had led the hospital medical staff's

continuing medical education program for four years. (CT 1073 line 27 to CT 1074 line 1) He had been president of the medical staff and then and thereafter a member of the Medical Executive Committee. (CT 1055 lines 13-16) He was in his third term as a member of the respondent hospital's Board of Governors and was then elected, also, to the further office of Secretary. (CT 1055 lines 16-17)

In 1984, NME's Chief Counsel and Assistant Corporate Secretary Layne for antitrust reasons warned the hospital against conducting a closed medical staff. (CT 1057 lines 3-10).

In 1984 the corporate respondents published the bylaws, parts of which prohibit removal of a physician's privileges except by due and fair processes and for good and sufficient cause. (CT 1074-1080) Corporate Bylaws, Article VIII, Section 7 (CT 1075 lines 15 to CT 1076 line 2). The bylaw specifies that any member physician having a contractual relationship with the corporation may have his clinical privileges terminated or restricted only in accordance with the hearing and appeals procedure, and that the mere expiration of the contractual relationship shall not constitute or permit termination of the privileges. The bylaw also shows that *privileges* refers to clinical privileges. Article 7.2, (CT 1075 line 13 to CT 1076 line 2), Exhibit 30 in Volume Two of Plaintiff's Response to Motion for Summary Judgment.

And the Medical Staff Bylaw Article 3.2-3 bars respondents from using the expiration of a medico-administrative position as a means or basis for canceling existing clinical privileges. (CT 1076 lines 8-18)

Petitioner several times demanded a hearing, e.g., on October 28, 1987 — Minutes of Board of Governors pages 5 and 6 and Appellant's Opening Brief pp. 18-19

— addressing the Board of Governors at its monthly meeting, (CT 1082 line 21 to CT 1088 line 22) and again by letter to Administrator Forrester of December 14, 1987. Each of his demands for a hearing were denied. Respondents' admitted that they permitted no hearing, e.g., on December 15, 1987 in a letter from NME agent and hospital CEO Forrester to petitioner. The letter admitted too that they allowed no proceedings under the bylaws and such had not occurred.

Dated on the same day, December 15, the letter from Vineyard Medical Group to petitioner advised that NME barred him from all radiological services, in-patient and out-patient. Exhibit 26b. (Appendix F herein. CT 1116 line 13 to CT 1117 line 20)

REASONS FOR GRANTING THE WRIT

I.

THE CALIFORNIA COURT OF APPEAL BY VALIDATING THE TERMINATION OF PHYSICIAN-PETITIONER'S CLINICAL PRIVILEGES VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION.

The action of the state appellate court departed from the due process and equal protection clauses and standards of the Fourteenth Amendment contrary to the teachings of *Shelley v. Kraemer*, 334 U.S. 1 (1948), and contrary to the teachings of *Thompson v. Louisville*, 362 U.S. 199 (1960).

The appellate court also violated 42 U.S.C.A. § 1981 *et seq.*, the Health Care Quality Improvement Act of 1986.

This Court in *Shelley v. Kraemer*, 334 U.S. 1 (1948), held the court's enforcement of racially restrictive covenants in real property to be state action in violation of the Fourteenth Amendment.

The Court in relation to cases of the *Shelley* genre has advised that it must determine whether there is state action by "sifting facts and weighing circumstances" on a case by case basis. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961); *Thompson v. Louisville*, 362 U.S. 199 (1960); *Barrows v. Jackson*, 346 U.S. 249 (1953); 48 Colum. L. Rev. 124 (1948); 44 Cal. L. Rev. 718.

In *Thompson, supra,* the Court stated that the ultimate question presented was whether the loitering and disorderly conduct charges against that petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Fourteenth Amendment. The decision on this question "turns not on the sufficiency of the evidence but on whether his conviction rests upon any evidence at all."

The questions here, as in *Shelley*, include whether the acts of the courts below constitute state action violating due process, and, as in *Thompson*, whether the stripping of petitioner's fundamental and vested rights on no evidence at all again violates due process. To both questions the answer should be "yes."

The state can imbue an otherwise private action with state action causing the blend to violate the Constitutional Amendment. As compared to *Shelley*, here the state action entailed its final and judicial reinforcing of the barrier against requital for the previous

destruction of the black physician's career without a hearing.

The effect of that action by the California court was to bring Fourteenth Amendment clauses as well as the petitioner down to defeat. As petitioner believes and as the circumstances show, had respondent not consistently refused to allow discovery on the race issue, he might — see Appendix G — have elicited testimony and secured writings revealing a pattern of near-absence of black radiologists as Department Directors across respondent's nationwide hospital chain. The ouster for racial reasons also connects to the circumstance that petitioner finds no opportunity or situation equivalent to that which respondents confiscated.

In *Shelley* the state's action consisted of the court's support of the racial covenantors; the injunction converted the private discrimination into a federal Constitutional illegality. Here again the state has acted in the enforcement mode. Its court has ratified the hospital's and Jenkins' taking from petitioner his clinical privileges and Department access. Its court has ratified the hospital's denials of the demanded hearing. Here, in other words, the full jury-absent coercive power of government by summary judgment forbade petitioner from securing condemnation of the hospital action. The court solidly has blocked him even from extracting relief by damages. In symbolic terms, the court stopped him from entering Radiology the next morning, picking up the file of the next patient, and resuming his radiology and nuclear medicine practice, whether as director or otherwise, as he had done for an entire decade.

The Court in *Shelley* left no question as to the compelling and onerous gravity of such lower court actions. In *Shelley*, 334 U.S. 1 at 20, this Court held that "when the effect of that action is to deny rights subject to the

protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands."

The Court in considering whether to call up this case, might weigh the effect not to do so: such would prejudice vital public welfare concerns by (a) leaving unaffected the no-hearing exclusion of petitioner from the Radiology Department and from vested clinical rights in Fourteenth Amendment equality, property and liberty; (b) removing from the community and from the precious momentum of his career, a physician with skills that are diagnostic in the advanced sense, via radiology and nuclear medicine; (c) in both those fields he was and remains Boarded and across those years vastly practiced; and (d) the termination without hearing or redress removes his role-model impact on young and developing minds.

The appellate court in its opinion (Appendix A, page A2, writes that ". . . plaintiff's hospital privileges were not terminated . . ." and therefore that petitioner has nothing to sue for. Like *Thompson*, there are no facts to support this view; the facts all go in the other direction:

1. Respondents' counsel in introducing respondents' summary judgment motion, stated that ". . . an ad hoc committee of the medical staff was formed for the purpose of recommending to the hospital administration a suitable candidate for the hospital to enter into an exclusive contract with as director of the Radiology Department." (CT 774 lines 11-16, 19-25)

2. Vineyard Medical Group (Pacific physicians Services) which had regularly sent patients to petitioner at the Radiology Department, answering petitioner's letter of November 16, 1987, Exhibit 26a, wrote petitioner on December 15, 1987, Exhibit 26b, that NME'S agent

Forrester informed them that petitioner shall henceforth not receive patients at the Department, because Dr. Shapiro has the contract. (CT 1116 line 8 to CT 1117 line 6) Respondent's counsel Mr. Faber admitted, Jenkins Deposition Vol. I, p. 95, that the letter Exhibit 26b, written by Vineyard to petitioner which advised petitioner that he was barred from handling Vineyard's patient-referrals — accurately stated NME'S position. NME precluded petitioner from all further service at the hospital's Department of Radiology to anyone, whether in-patient or out-patient. (Appendix F)

3. The Chief of the Medical Staff, respondent Dr. Jenkins and respondents' counsel Faber in the Jenkins deposition both stated that petitioner could not perform diagnostic studies, and can't use x-ray equipment and charge for it. (Jenkins, in Deposition Vol. I, pp. 90-91.) Mr. Faber, as counsel, there stated that "He can't perform diagnostic studies." (p. 92) Mr. Faber also stated — referring to the letter of December 15, Exhibit 26b, above, eliminating petitioner from serving both inpatients and outpatients — that ". . . I think the letter set forth the position of the hospital." (p. 95)

4. Respondent Dr. Jenkins, in 1987 the President of the Medical Staff, Deposition Vol. I, pp. 90-92, stated regarding the effect of the exclusive Shapiro contract on petitioner: ". . . as far as I know, its exclusive using the equipment." (pp. 94-95)

5. Respondents' attorney Faber stated during the deposition of deponent-respondent Jenkins, that petitioner does not hold "the right to perform diagnostic studies at hospital, on patients, because he does not have the contract, Shapiro has." (CT 1306 line 25 to CT 1307 line 3)

6. Turning from events of the latter part of 1987: At the beginning of that year, Forrester met with his supervisor the NME regional vice president and told that he was considering replacing petitioner, and the vice-president advised that he consult members of the medical staff if he decided to go ahead. (CT 1055-1069, CT 1066 line 12 to CT 1068 line 4, Deposition of Forrester Vol. I, p. 148) Forrester did so. Dr. Jenkins gathered a "committee" the majority of which were biased even then, against Petitioner. Dr. Jenkins testified that the first meeting of the resulting "radiology committee" occurred in the early summer of 1987, and that the meeting "very probably" occurred before notifying petitioner that his contract would not be renewed. (Jenkins Deposition Vol. I p. 79, CT 1068 lines 5-9; Forrester Deposition Vol. I, p. 125 lines 16-25, CT 1068 lines 5-17) Jenkins and Forrester knew that at least a majority of the group was against petitioner from the start. (CT 1110 lines 1-16; Forrester Deposition Vol. I, p. 144)

The statement of the appellate court, at page 2 of the Opinion (Appendix A-2) that ". . . plaintiff was not entitled to a hearing . . ." is groundless. The law holds that clinical privileges constitute fundamental, vested and tenured property and liberty — which respondents cannot terminate without a due process or common law fairness hearing.

In California a physician has tenure; his privileges are part of his property and liberty and, once granted, become vested and fundamental. A private party which takes them away without grounds and a hearing violates them. *Miller v. Eisenhower Hospital* (1980) 27 Cal.3d 614, 627, n.13; *Ascherman v. Saint Francis Memorial Hosp.* (1975) 45 Cal.App.3d 507, 508 (*Ascherman II*); *Westlake Community Hospital v. the Superior Court* (1976) 17 Cal.3d 465, involves the doctor bringing an

action against a hospital and members of its board, for damage resulting from *hospital revocation of plaintiff's staff privileges and from hospital exclusion of plaintiff from privileges.* Justice Tobriner for the *Westlake* Court wrote, "Recent California decisions establish that before a *public or private* hospital may deny a doctor the right to practice his profession at that hospital, either by the termination of existing staff privileges or by the denial of an initial application for such privileges, the hospital *must* provide a fair procedure which affords the doctor an opportunity to answer the charges upon which his exclusion rests," *id.* at 468, citing *Pinsker I* (1974) and *Ascherman I* (1974). (Emphasis added.)

The list includes other cases which demonstrate the fiduciary duty of the respondents to provide a proper, due process or common law fairness hearing: *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, 815, 823; *Applebaum v. Board of Directors of Barton Hospital* (1980) 104 Cal.App.3d 648, 652, 653, 656-659; and *Ascherman v. Saint Francis Memorial Hospital* (1974) 39 Cal.App.3d 623, 631, 636, 637, 640, 643-644, 648 (*Ascherman I*).

Further, *Bergeron v. Desert Hospital Corp.* (1990) 221 Cal.App.3d 146, *rev. denied*, of the instant Fourth Appellate District emphasizes that: the clinical privilege constitutes as vested and fundamental property right. *Volpicelli v. Jared Sidney Torrance Memorial Hospital* (1980) 109 Cal.App.3d 242, 248; and *Rosenblit v. Superior Court (Mountain Valley Hosp.)* (1991) 231 Cal.App.3d 1434.

Petitioner possessed the undeniable right to a hearing.

Allowance of fictions can destroy law. Early uses of fiction as means to impose forfeiture, as in outlawry and corruption of blood, were barred by the Constitution from the outset. Here, however, is a use of fictions to

secure a forfeiture — of a physician's vested property and liberty. The history of advances in the common law importantly involved a reduction of fictions — Carl Joachim Friedrich, "Confiscations," *Encyclopedia of the Social Sciences* (1931) lst ed. vol. 4, pp. 183-187; Blackstone, *Commentaries on the Laws of England*, vol. II, book 4, p. 2625, n.3 (Bancroft-Whitney 1916).

Petitioner invokes a judicial promise made forty-five years ago, when in *Shelley v. Kraemer*, the Court referred to the "obligation of this Court to enforce the constitutional commands." And the Court added at the last page, (*Shelley*, 334 U.S. 1 at 23) "The task of determining whether the action of a State offends constitutional provisions is one which may not be undertaken lightly . . . Reversed."

The instant decision rests on fictions. It is also wrong, starting with the ruling that would dethrone the peer review system. The case deserves to see the light of day for it calls up the most paramount fundamental and vested right of the physician, to continue to practice his profession and expand his knowledge and experience by enjoying the law's protection of his fiduciary-tenured privileges.

The rule effectively making the doctor the owner, for life, of his right to practice his privileges, is a right rule. The California courts have breached that rule. The courts below use fictions to perpetrate and confirm a forfeiture.

II.

THE RULING SUBVERTS FEDERAL LAW.

Federal questions decided in conflicting ways can support certiorari, as when state courts of last resort decide federal questions in conflict with the federal statutes or decisions of United States Courts of Appeals, or where an entire tangle of conflicts appears among the courts of the states. Rule 10 of this Court. Thus the instant ruling conflicts with *George Austin, M.D. v. McNamara, et al. and Santa Barbara Hospital*, 979 F.2d 728 (1992) and with the federal standard which it applies, and with rulings of various other states, as well as the Supreme Court of California.

The Court by certiorari takes up decisions of state courts of appeal that defy or conflict with important principles of federal law or with decisions of federal or state courts. Cases listed in the current West's *National Digest System, Decennial Digest*, "Hospitals," key #6 "Management Institutions" show the wide discrepancies among the high courts of the states from each other and the Federal Health Care Quality Improvement Act, 42 U.S.C.A. §§ 11111-11152, Appendix D, and from *Austin* which applies it. The statute enacts and the *Austin* decision recognizes as the national standard the obligation of the hospital to provide peer review where the quality of the physician's medical performance has been challenged (*id.* and § 11102) including when the threat of severance of privileges arises. The elements required in order to satisfy such a process include, e.g., notice of proposed action, notice of hearing, the right to a hearing and the right to an arbitrator "acceptable to the physician and health care entity." The Ninth Circuit in the *Austin* case, and that federal statute, show a federal question.

The instant ruling, which has survived three levels of the California courts, directly conflicts with Federal standards and law — supporting certiorari.

III.

THE APPELLATE COURT REFUSED TO RECOGNIZE, MUCH LESS CONSIDER, PETITIONER'S RESPONSE TO AND CORRECTION OF ITS TENTATIVE OPINION, AND IMPOSSIBLY LIMITED THE TIME FOR ORAL ARGUMENT.

The appellate court issued a "Tentative Opinion to guide counsel in shaping their oral arguments. Petitioner responded by preparing a Supplementary Letter-Brief setting forth the mistakes of fact and errors of law, and requested permission to file it. (Appendix E herein) The court refused and returned petitioner's request and the proffered Supplement. The Court of Appeal also restricted the total time for petitioner's oral argument to fifteen minutes. The court's Tentative Opinion was replete with errors and mistakes requiring petitioner in his proffered 55-page Supplementary Letter-Brief to present corrections. The 15-minute limitation on oral argument, in view of so many misstatements, deprived petitioner of a realistic opportunity to be understood and his corrections considered.

In view of the appellate court's actions, petitioner presented to the California Supreme Court his federal constitutional argument invoking due process and equal protection. For example, on page 8 of said Petition for Review, the petitioner stated:

> Thus, the Court of Appeal here has, through the extension of the fictional reasoning of such

> cases as *Centano* and *Mateo-Woodburn*, enforced Respondent hospital forfeiture of Petitioner's vested property right in his staff privileges without due process of law, in violation of the Fourteenth Amendment to the United States Constitution. *Shelley v. Kraemer* (1948) 334 U.S. 1. As in *Shelley*, Petitioner, a black physician, has asserted that Respondent acted on racial motivation to deprive him of his property rights, and the Court of Appeal here, through its fictional finding that Respondent did not terminate Petitioner's staff privileges, and that Petitioner was not entitled to a hearing, has validated that deprivation.

The court's acceptance of the summary judgment thwarted the ruling on petitioner's motion to compel (CT 280-360) discovery. That acceptance choked off the right of petitioner to conduct and complete discovery on the race issue, which discovery respondents had previously and totally refused.

IV.

ALTHOUGH THE COURT OF APPEAL ORDERED THE OPINION TO BE "NOT FOR PUBLICATION," A DIFFERENT KIND OF PUBLICATION CAN OCCUR.

Even though the appellate court ordered that the decision shall not be published, certainly the ruling will reach the respondents' executives and medical staffs. It will disclose to them, and to others via such grapevine as might extend from them, the way to "white" (Appendix G) and corporate managerial dominance over the physician's rights and physicians' peer review and due

process procedures which federal law and California case law so far requires.

The respondent hospital-chain corporation has a hundred-odd hospitals, spread nationally. Predictably each will become a nodal point from which further publication will occur. The recipients in the hospitals, regions and communities will learn how peer review might henceforth be circumvented.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: August 9, 1994.

Respectfully submitted,

GERALD H. GOTTLIEB

Counsel of Record for
LAWRENCE F. BROWN, M.D.

APPENDIX A

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

FILED
FEB 22, 1994
Court of Appeal
Fourth District

LAWRENCE F. BROWN,
Plaintiff and Appellant,
v.
NATIONAL MEDICAL ENTERPRISES, INC., et al.,
Defendants and Respondents.

E010073
(Super.Ct.No. RCV47045)

OPINION

Appeal from a judgment of the Superior Court of San Bernardino County. William Pitt Hyde, Judge. Affirmed.

Gerald H. Gottlieb, and Robert S. Gerstein, for Plaintiff and Appellant.

Dummit, Faber & Brown, Christopher J. Faber and Dianne E. Timmons, for Defendants and Respondents.

After NME Hospitals, Inc. (NME), dba Doctors' Hospital of Montclair (the hospital) declined to renew its contract with Lawrence Brown, M.D. (plaintiff) to provide radiology services to the hospital, plaintiff filed an action against NME, the hospital, and the president of the hospital's medical staff, alleging: (1) three counts of conspiracy; (2) two counts of breach of the implied covenant of good faith

and fair dealing, and (3) one count of breach of the Unruh Civil Rights Act (Civil Code § 51 et seq). Thereafter, the trial court granted defendants' motion for summary judgment and entered judgment in their favor, leading to this appeal.

Plaintiff contends the court erred in granting the motion because defendants had a fiduciary duty to hold a hearing before terminating his hospital privileges, and because there are many triable issues of material fact related to the termination. However, as we shall show: (1) plaintiff's hospital privileges were not terminated; (2) plaintiff was not entitled to a hearing just because the hospital declined to renew his contract, and (3) plaintiff has not demonstrated that the record presents any triable issues of material fact. We shall affirm the judgment accordingly.

FACTUAL AND PROCEDURAL BACKGROUND

On December 1, 1977, plaintiff and Robert Sturr, Jr., M.D. (Sturr) entered into a written agreement with the hospital whereby plaintiff and Sturr agreed to operate the hospital's department of radiology as independent contractors for a period of three years.

On December 1, 1980, after Sturr died, plaintiff entered into a similar agreement with the hospital for an additional five years.

On December 1, 1985, plaintiff entered into a similar agreement with the hospital for another two years. The 1985 agreement, whose non-renewal resulted in the underlying action, provided in relevant part:

"I. OPERATION OF THE DEPARTMENT [of Radiology] . . . [¶] B. Radiologist [Lawrence F. Brown, M.D., Inc.] shall provide full-time professional Radiology services to Hospital's patients upon request of Medical Staff Practitioners. Physician Associated [radiologists employed by Radiologist] shall provide all professional services required from the Department in the normal scope of its and the

hospital's operations. . . . [¶] C. . . . If Radiologist is unable to provide the services of Physician Associates as required hereunder . . ., it shall provide suitable substitute coverage at its own cost to meet the needs of the Hospital's medical staff."

"III. PROFESSIONAL QUALIFICATIONS [¶] A. Each Physician Associate . . . shall at all times maintain appropriate staff membership, privileges and state licensure."

"VI. TERM AND TERMINATION [¶] A. This Agreement shall remain in effect for a term of two years, beginning December 1, 1985, and ending at midnight on November 30, 1987, unless otherwise terminated as provided therein. [¶] B. Either party may terminate this agreement without cause upon ninety (90) days' written notice to the other party . . . ."

"VII. INDEPENDENT CONTRACTOR [¶] Radiologist and its Physician Associates shall perform the services and duties required hereunder as independent contractors practicing a profession and not as employees, agents, or partners of, or joint venturers with, Hospital."

"IX. MISCELLANEOUS [¶] . . . C. This agreement contains the entire agreement of the parties hereto and supersedes all prior agreements, representations, and understandings, whether written or otherwise, between the parties relating to the subject matter thereof. . . . [¶] D. Radiologist shall not . . . suffer any other person (the agents and Associates of Radiologist excepted) to occupy the said premises, or any portion thereof, without the prior written consent of Hospital."

The agreement did not contain any renewal provisions.

The agreement was signed respectively by plaintiff on behalf of Lawrence M. Brown, M.D., Inc., and by Richard J. Forrester, the hospital's chief executive officer (Forrester), on behalf of the hospital.

On August 25, 1987, 95 days before the 1985 agreement was due to expire, Forrester sent plaintiff the following letter

by certified mail: "Dear Dr. Brown: [¶] Please be advised that at this time, according to the Radiology Agreement entered into on December 1, 1985, Doctor's Hospital of Montclair hereby gives you 90-days written notice of its intent to terminate this agreement without cause. [¶] This notice is given in accordance with Section VI, Subsection B, 'either party may terminate this agreement without cause upon ninety (90) days written notice to the other party . . . .' [¶] Doctors' Hospital of Montclair appreciates the service you have provided under the terms of this contract. [¶] Sincerely, [¶] Richard J. Forrester [¶] Chief Executive Officer"

On September 3, 1987, after he received the foregoing letter, plaintiff wrote to the following letter to Forrester: "Dear Mr. Forrester, [¶] I received your notice on September 2 1987 which stated that 'Doctors Hospital of Montclair gives you 90-days written notice to terminate this agreement without cause.' (Radiology agreement) [¶] I love Doctors Hospital of Montclair. I assure you that I want to have my contract renewed. I would like to sit with you and discuss any new recommendations that you may have in mind. As always, I am flexible and open minded. [¶] Kindly let me know when we can meet. [¶] Sincerely yours, [¶] Lawrence F. Brown, M.D."

On September 21, 1987, at a meeting of the hospital's governing board, Forrester told the board that the hospital administration was recommending that the hospital not renew its contract with plaintiff. Forrester said it was the hospital's position that the professional services of the radiology department had fallen behind those of other hospitals in the area. Forrester also said that plaintiff would be allowed to submit a proposal to the hospital for a new contract.

Thereafter, plaintiff and two other radiologists were notified that they could submit bids to provide radiology services to the hospital. The three candidates were interviewed by the radiology subcommittee of the medical staff executive committee. The members of the subcommittee

agreed that plaintiff would not be appropriate and that either of the other candidates "would be a significant improvement" and "appropriate for contracting services."

On October 28, 1987, according to the minutes of the hospital's board, plaintiff, who was a member of the board, "expressed his disapproval to the Board members concerning the fact that his contract had not been renewed. He stated that he felt that the composition of the physician interview panel was unfair because a large number of these physicians sat on the Executive and Governing Boards." Plaintiff moved that the board rescind its recommendation that the hospital not renew its contract with him, and that the recommendation be referred to an independent group of physicians. Both motions died for lack of a second.

On November 16, 1987, plaintiff wrote Dr. Phil Gutierrez, the medical director of the Vineyard Medical Group. The letter recited, in relevant part: "Doctors Hospital of Montclair did not renew my exclusive contract in radiology. However, I am still an active member on the medical staff and I still have my radiology privileges. [¶] I still would like to remain your radiologist at Doctors Hospital."

On November 27, 1987, plaintiff wrote letters to Forrester, to Dr. Kevin Jenkins, the president of the medical staff (Jenkins), and to Fritz Moser, the chairman of the hospital's governing board (Moser) that he, plaintiff, had "engaged legal counsel for the immediate and specific task of attempting, amicably, to persuade your organization to rescind and reverse your recently indicated intention to terminate and sever me from certain connections in the directorship of radiology of [the hospital]."

On December 14, 1987, after plaintiff's contract with the hospital had expired, plaintiff wrote Forrester, Jenkins, Moser, and representatives of NME. The letter recited in relevant part: "[O]n December 1, 1987 you did demand that I vacate and surrender my desk in radiology and you took other actions to remove me from my post and position. [¶] Additionally, I understand that you have taken various

actions which interfer[e] with the exercise of my clinical privileges — though you assure my counsel that my privileges are in[]tact. [¶] Accordingly, I request from you the statement of grounds and reasons for your actions and request the convening of a hearing according to the by-laws whereby such grounds or reasons, if any, will be heard and determined and where[]in I will have full advance opportunity to receive all papers and other documents which might turn out to be material, in order to respond."

The following day, December 15, 1987, Forrester sent plaintiff the following letter by certified mail: "Dear Dr. Brown: [¶] I am writing in response to your letter of December 14, 1987. The Radiology Agreement dated December 1, 1985, between NME Hospitals, Inc. ('NME') doing business as Doctors' Hospital of Montclair and yourself expired November 30, 1985. Additionally, NME provided you with ninety days written notice of its intent not to renew this agreement with you. NME has entered [into] a new agreement for provision of director of radiology services at the hospital which is currently in effect. [¶] *No action has been taken to terminate or restrict your medical staff privileges at [the hospital].* Under the medical staff bylaws at the hospital any such termination or restriction of your medical staff privileges would first require recommendation from the medical staff and final approval by the governing body, none of which has occurred. *I assure you that your medical staff privileges remain fully intact, and no action has been taken to restrict your medical staff privileges.* [¶] Please call me if you have any questions. [¶] Sincerely, [¶] Richard J. Forrester [¶] Chief Executive Officer." (Emphasis added.)

Thereafter, as above noted, plaintiff went to court by filing a complaint against the hospital, Jenkins, and NME (defendants). As amended, the complaint alleged causes of action for: (1) conspiracy and breach of fiduciary duty by wrongful termination; (2) conspiracy and intentional interference with medical practice; (3) violation of the Unruh

Civil Rights Act and of civil justice; (4) tortious breach of the implied covenant of good faith and fair dealing; (5) conspiracy to oust plaintiff from the practice of radiology and nuclear medicine and to restrain and monopolize trade, and (6) post-termination breach of the implied covenant of good faith and fair dealing.

In allegations which were incorporated into all six causes of action, plaintiff alleged that: (1) "[i]n 1977 he became Radiologist and Director of the Department of Radiology" at the hospital; (2) he has been a member of the hospital's staff since 1975 and, until defendants' misconduct, held "the full set of privileges in radiology and relate[d] subjects"; (3) his radiology privileges "embraced all [his] functions . . . as Radiologist and Director of Radiology"; (4) the "rules" which applied to him and to all of the hospital's physicians prohibited termination of his privileges without cause, peer review, and appeal procedures; (5) under the fiduciary relationship between him and defendants and under the hospital's bylaws, he was entitled to a hearing as a precondition to his termination; (6) in the fall of 1987, defendants terminated his medical-clinical privileges and position as director of radiology without complying with his demands as to his procedural and substantive rights; (7) in December 1985 and again approximately a year later defendants impliedly agreed with him that his "position was assured and that his tenure was to extend for an indefinite period subject to termination only for good cause or if [he] voluntarily were to resign"; (8) he is black and defendants conspired to terminate him because of his race; (9) no black physician participated in selecting plaintiff's successor, and (10) no black physician was chosen to replace him.

Plaintiff sought damages for loss of past and future earnings in a sum of over $9,000,000, as well as punitive (exemplary) damages and attorney's fees and costs.

Plaintiff's complaint did not refer to any contract between him and the hospital, and did not include a copy of the hospital's bylaws, or any portion thereof.

Defendants answered the complaint, denying its allegations, and alleging, as a fourth affirmative defense, that "plaintiff's amended complaint herein in its entirety is without merit in law or in fact as defendant and its employees performed all terms and conditions of the written contract with plaintiff."

Then, after extensive discovery and discovery battles, which resulted in the appointment of a referee, defendants noticed a motion for summary judgment.

Defendants' separate statement of undisputed facts in support of the motion recited as follows:

"1. Plaintiff and Hospital entered into an exclusive contract, the purpose of which was for Plaintiff to provide radiology service to the hospital for a specified term of two years terminating November 30, 1987."

"2. As set forth in the contract between Plaintiff and the Hospital, Plaintiff was an independent contractor."

"3. As set forth in the contract between Plaintiff and the Hospital, either party could terminate the contract on ninety days notice *without cause*." (Emphasis in original.)

"4. As set forth in the contract between Plaintiff and the Hospital, the agreement expired pursuant to its terms."

"5. On August 25, 1987, the Chief Executive Officer of the Hospital, Richard J. Forrester, notified Plaintiff in writing that the 1985 Agreement between Dr. Brown and the Hospital would not be renewed after its expiration on November 30, 1987."

"6. [The hospital] exercised its administrative discretion and entered into an exclusive contract for the performance of radiology services with Dr. Shapiro and, subsequently, other physicians."

Facts No. 1 through 4 were supported by the 1985 agreement; fact No. 5 was supported by the agreement and by Forrester's August 25, 1987, letter to plaintiff, *ante*, and fact No. 6 was supported by Forrester's declaration.

Forrester's declaration recited, in relevant part: (1) plaintiff had had the exclusive contract to perform radiology services at the hospital since at least 1977; (2) it is customary to award exclusive contracts to physicians with regard to the operation of the emergency room and the departments of pathology and radiology; (3) in September 1987, the hospital's radiology subcommittee recommended Dr. Shapiro as the best qualified candidate to enter into a contract to serve as the director of the hospital's radiology department; (4) after the hospital's 1985 agreement with plaintiff expired, the hospital entered into an exclusive agreement with Dr. Shapiro, and (5) after the hospital's contract with Dr. Shapiro expired, the contract was not renewed and the hospital entered into an exclusive contract with yet a different physician.

Defendants' motion for summary judgment was set for hearing on April 17, 1991. At plaintiff's request, the hearing was continued to May 8, 1991. At plaintiff's request, the hearing was continued to May 8, 1991, and then to May 15, 1991.

On May 1, 1991, plaintiff filed over 200 pages of materials in opposition to defendants' motion. The opposition included an 80-page separate statement in response to defendants' separate statement of undisputed facts. In the separate statement, plaintiff disputed defendants' Facts No. 1 through 6,

As to defendants' Fact No. 1, that plaintiff and hospital entered into an exclusive contract for plaintiff to provide radiology services to the hospital for a specified term of two years, plaintiff argued that: (1) there was no such contract, because the "1985 document" was not signed by NME; (2) the text of the 1985 document shows it was not exclusive, and (3) the purpose of the 1985 document was not to provide radiological services to the hospital because plaintiff rendered such services under his hospital membership and privileges.

As to defendants' Fact No. 2, that the contract provided that plaintiff was an independent contractor, plaintiff argued: (1) he was a member of the hospital's board of governors and "a Board Member of nearly a decade cannot be deemed an independent contractor"; (2) he did not think of himself as an independent contractor, and (3) NME did "dependent-inducing things" such as supplying radiological equipment and changing the scheduling of his ultrasound technician.

As to defendants' Fact No. 3, that the contract provided that either party could terminate it on 90 days notice without cause, plaintiff argued the proposition was irrelevant, misleading, and disputed, because: (1) the "document" was subordinate to the hospital's bylaws providing that privileges cannot be abridged by the termination or expiration of a service contract, and (2) the document was subordinate to "the implied and orally confirmed agreement of tenure."

As to defendants' Fact No. 4, that the contract expired pursuant to its terms, plaintiff argued that the proposition was irrelevant, misleading, and disputed, "for the reasons stated above."

As to defendants' Fact No. 5, that Forrester notified plaintiff in writing that his contract would not be renewed, plaintiff argued that "[t]here was nothing to renew that was relevant [because] the clinical privileges and post were guaranteed by the implied and orally-confirmed agreement of tenure and by the bylaws."

As to defendants' Fact No. 6, that the hospital exercised its administrative discretion and entered into an exclusive contract with Dr. Shapiro, plaintiff argued that the exclusive contract was an anti-trust violation and therefore not within the hospital's administrative discretion.

Plaintiff's separate statement included nine "facts" which plaintiff contended were disputed. Such facts were:

1. The 1985 agreement was not exclusive.

2. The 1985 "document" could not terminate plaintiff's hospital membership or privileges.

3. The 1985 document was not a contract.

4. Plaintiff was not an independent contractor.

5. Although they received the anti-trust warning, defendants "closed out" plaintiff.

6. The rights recited in the 1985 document "were repetitious recitations of plaintiff's preexisting clinical privileges."

7. "Plaintiff and [NME], through Forrester formed an implied contract based on, e.g. plaintiff's right of tenure, which they confirmed by a parole agreement at the end of 1986. That implied contract and its confirmation clarified or novated any contractual reality *arguendo* possessed by the so[-]called contract of 1985."

8. "The defendants formed a conspiracy to oust the plaintiff . . . from his privileges, his practice, his role as Radiologist and Director of the Radiology Department, and thus from active membership in the hospital."

9. "After sending the edict that his 'contract' would not be renewed . . . defendants and coconspirators represented that the 'committee' consisted of his champions . . . [and] that he was on the selection 'committee's' 'inside track' . . . and . . . led plaintiff to conclude that if he would meet with the 'committee' he would be continued as Radiologist and Director of Radiology; the representation was false, and plaintiff was again rejected."

As supporting evidence for the foregoing "facts," plaintiff referred in general terms to: (1) the 1980 contract; (2) the 1985 contract; (3) answered to interrogatories; (4) deposition testimony; (5) NME's bylaws; (6) the hospital's bylaws; (7) various exhibits, and (7) "[t]he law itself."

For example, plaintiff's supporting evidence for his disputed Fact. No. 7, the alleged implied contract of tenure, recited: "the bylaws of the corporation and of the medical staff showing that plaintiff was entitled to due process rights, the 1980 agreement's Paragraph Nineteen confirming same; the bylaws of the corporation showing that signing of

trust. Cluck reluctantly admitted that he provided less detailed information concerning the financial affairs of the trust to the co-trustees and beneficiaries than he did to appellant. Specifically, Cluck send out two separate letters of information. One letter, three pages long, was sent to appellant detailing appellant's expenditures for the trust and stating that the general expenditures of the trust for the year "consist almost entirely of [appellant's] credit card expenses." The other letter was sent to beneficiaries. That letter, three paragraphs long, was sent to beneficiaries and merely stated the sum total of trust expenditures for the year. Moreover, Cluck testified that he had not segregated bills so appellant's personal work appeared to be work for the trust and, therefore, was billed to the trust. Consequently, the co-trustees and beneficiaries were unable to determine which portions of the bill were for work rendered for appellant and not for the trust.

Clearly, there is more than just some evidence to support the jury's finding that Joe and the beneficiaries did not discover and should not have discovered the facts giving rise to the claim against appellant. Appellant asserts that Joe Carter was a co-trustee and signed reimbursement checks for appellant, thus, creating a presumption of Joe's knowledge of Clyde's expenditures. Moreover, appellant argues that Joe wrote a letter to Clyde on November 10, 1985, which served as evidence of Joe's knowledge as to what Clyde was doing with the trust. Appellant contends that the letter stating that Joe would no longer sign reimbursement checks to Clyde, coupled with Joe's earlier voice of discontentment is evidence of Joe's knowledge of Clyde's handling of the trust,

at least as of November 10, 1985. The letter reads as follows:

> 11, 10 1985
>
> Hi Clyde
>
> Dorise [sic] and Neal Said not to Sing [sic] check for cash Neal Said he thought you have Estate Settle By Jan 15 1986 [sic]
>
> Joe

Explaining why he wrote the letter, Joe testified that he understood from Neal that Clyde was to close the Estate in January 1986, and that Clyde was not providing receipts for the money he was spending from the trust. That evidence does not constitute enough evidence to make the jury's finding against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *Cain*, 709 S.W.2d at 176.

Appellant's fifth point of error argument further asserts that the trial judge erred in denying appellant's motion for new trial. The granting or denial of a motion for new trial is addressed to the sound discretion of the trial court and the trial court's action will not be disturbed on appeal absent an abuse of discretion. *Strackbein v. Prewitt*, 671 S.W.2d 37, 39 (Tex. 1984). Since the findings of the jury where based on evidence which was not against the overwhelming weight and preponderance of the evidence, the trial court did not abuse its discretion by denying appellant's motion for new trial. *Strackbein*, 671 S.W.2d at 39. We overrule appellant's fifth point of error.

ACTUAL DAMAGES

Appellant's sixth point of error contends the jury's award of $7 million actual damages is excessive. Claiming there is no evidence to support actual damages in excess of $3,319,747.14, appellant argues the trial court erred in denying appellant's second amended motion for judgment non obstante veredicto and in overruling his motion for new trial. It appears that appellant, through a parenthetic expression within this same no evidence point of error, is also arguing a factual insufficiency point. We first address the no evidence point.

Relying on the current pre-judgment statute, appellant asserts that the judgment awarded $3,681,252.86 in prejudgment interest, but the maximum allowable amount under the statute is $700,122.50. TEX. REV. CIV. STAT. ANN. art. 5069-1.05, § 6 (Vernon 1993).

> **Art. 5069-1.05. Rate of judgments**
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> . . .
>
> Sec. 6. (a) Judgments in wrongful death, personal injury, and property damage cases must include prejudgment interest. Except as provided by Subsections (b), (c), and (d) of this section, prejudgment interest accrues on the amount of the judgment during the period beginning on the 180th day after the date the defendant receives written notice of a claim or on the day the suit is filed, whichever occurs first, and ending on the day preceding the date judgment is rendered.
>
> (b) If judgment for a claimant is less than the amount of a settlement offer by the defendant, prejudgment interest does not accrue on

the amount of the judgment for the period during which the offer may be accepted.

(c) If judgment for a claimant is more than the amount of the settlement offer by the defendant, prejudgment interest does not include prejudgment interest on the amount of the settlement offer for the period during which the offer may be accepted.

(d) In addition to the exceptions provided under Subsections (b) and (c) of this section, the court in its discretion may order that prejudgment interest does or does not accrue during periods of delay in the trial, taking into consideration:

(1) periods of delay caused by a defendant; and

(2) periods of delay caused by a claimant.

(e) In order for a settlement offer to toll the running of prejudgment interest in accordance with the provisions of this section, the offer must be communicated to a party or his attorney or representative writing.

(f) If a settlement offer is made for other than present cash payment at the time of settlement, prejudgment interest on the amount of the settlement offer at the time it is made.

(g) The rate of prejudgment interest shall be the same as the rate of postjudgment interest at the time of judgment and shall be computed as simple interest.

TEX. CIV. PRAC. & REM. CODE ANN. art. 5069-1.05, § 6 (Vernon 1993). While appellant relies on the statutory

limitations for pre-judgment interest, he fails to acknowledge the additional responsibility of a fiduciary.

> Section 114.001. Liability of Trustee to Beneficiary
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> . . .
>
> (c) A trustee who commits a breach of trust is chargeable with any damages resulting from such breach of trust, including but not limited to:
>
> (1) any loss of depreciation in value of the trust estate as a result of the breach of trust;
>
> (2) any profit made by the trustee through the breach of trust; or
>
> (3) any profit that would have accrued to the trust estate if there had been no breach of trust.

TEX. PROP. & CODE ANN. § 114.001(c) (Vernon 1984). Clearly, "any profit that would have accrued to the trust estate if there had been no breach of trust," can mean more than just the statutory prejudgment interest. TEX. REV. CIV. STAT. ANN. art 5069-1.05, § 6 (Vernon 1993). The rate of return on the trust funds, coupled with the safety of those funds, is necessary to calculating what profits the trust funds would have returned in a breach of contract. *See Humane Soc'y of Austin and Travis County v. Austin Nat'l Bank*, 531 S.W. 574, 580 (Tex. 1975).

A loss of profits in trust property, caused by a trustee's breach of fiduciary duty, results in damages in the amount of profit which would have accrued but for the breach. *Slay v. Burnett Trust*, 187 S.W.2d.377, 393 (Tex. 1945); *Langford*, 417 S.W.2d at 445; TEX. CIV. PROP. CODE

ANN. 114.001(c) (Vernon 1984). To hold otherwise, is to allow a trustee who breaches his responsibility to deprive the beneficiaries of the trust profits which could have been made from investments yielding high interest. At the same time the trustee would only be liable for the statutory amount which is currently ten percent. This inequity in trust profits is specifically rejected in the Trust Code. TEX. PROP. CODE ANN. 114.001(c) (Vernon 1984).

In a suit against a trustee for breach of fiduciary duty, interest made from investments is not pre-judgment interest, but an element of damages for the trust's lost use of the money allegedly misappropriated. TEX. PROP. CODE ANN. § 114.001(c) (Vernon 1984); *Holloway v. Int'l Bankers Life Ins. Co.*, 354 S.W.2d 198, 213 (Tex. Civ. App. – Fort Worth 1962), *rev'd on other grounds*, 368 S.W.2d 567 (Tex. 1963). Thus, more than the statutory amount for prejudgment interest can be applicable, as in this case, where a higher than statutory interest of "profit would have accrued to the trust estate if there had been no breach of trust." TEX. PROP. CODE ANN. § 114.001(c) (Vernon 1984).

Appellant argues that there is no evidence to support actual damages in excess of $3,319,7477.14 [sic]. The evidence presented at trial, however, reveals that there was evidence to support the finding of damages of $3,681,252.86 for which the appellant now complains. The evidence presented at trial included: 1) a computer printout of items and interest from 1974 through 1990, 2) evidence of appellant's use of trust funds to pay for personal living expenses, personal legal work, and personal accounting work, 3) evidence that appellant usurped an estate business opportunity netting a profit in

excess of $440,000.00 for himself, 4) evidence that appellant made as high as 13% interest in certificate of deposits from the $440,000.00 profit, 5) evidence that there were not enough funds available after appellant took his $1.45 million in fees and claims, 6) evidence that the prime interest rate on loans during the time period was between 8 percent and 15 and 3/4 percent, and 7) evidence that the expert preparing the summary of the total loss to the estate trust used a reasonable 10 percent factor. Clearly, there was evidence to support the jury's finding. We overrule appellant's sixth point of error.

EXEMPLARY DAMAGES

Appellant's seventh and final point of error contends the exemplary damage award is unconstitutional. Appellant argues that under the Fourteenth Amendment of the United States Constitution and under the due course of law provisions of Article 1, Sections 13 and 19, of the Texas Constitution, the award is infirm. Claiming there is a lack of guidance in jury instructions for exemplary damages, appellant argues that in Texas "the jury's determination is an arbitrary process without any objective standards." *State Farm Mut. Auto. Ins. Co. v. Zubiate,* 808 S.W.2d 590 (Tex. App. – El Paso 1991, writ denied). The appellant claims that because the procedures and methods by which exemplary damages in Jury Question 5 are unconstitutional, the trial court erred in not granting appellant's second amended motion for judgment non obstante veredicto or in not disregarding Question 5.

Appellant's objection to Jury Question 5 was stated in complete as follows: "Question Number 5 is objected

to on the grounds that there are no pleadings or evidence to support the submission of such issue. Further, that legally, exemplary damages should not be awarded under the evidence as presented in this case." Within appellant's objection there is no specific objection as to the unconstitutionality of the jury question for exemplary damages. Yet, on appeal appellant specifically raises the constitutionality issue.

> **Rule 274. Objections and Requests**
>
> A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, **is waived unless specifically included in the objections. . . .**

Tex. R. Civ. P. 274. The purpose of Rule 274 is to provide the trial court with the opportunity to make corrections of errors in the charge. *Castleberry v. Branscum*, 721 S.W.2d 270, 276 (Tex. 1986). When the objections do not clearly state the grounds, the trial court is denied the opportunity to correct the mistake, and the requisites of Rule 274 are not met for appeal purposes. *Wilgus v. Bond*, 730 S.W.2d 670, 672 (Tex. 1987).

In the present case, the appellant made no constitutional objection to the jury question on exemplary damages to preserve his error. *General Chemical Corp. v. De La Lastra*, 815 S.W.2d 750, 760 (Tex. App. – Corpus Christi 1991, writ granted) (*rev'd in part on other grounds*, 852 S.W.2d 916, 919 (Tex. 1993) (choice of law arguments are waivable)). Consequently, we are unable to review appellant's final point or error, and it is overruled. Tex. R. Civ.

P. 272 and 274. Similarly, appellees David and Anita failed to preserve their point of error. The record before this court does not reveal an objection or a complaint as to the exemplary damage award at any time at the trial level. Because the record does not reveal an objection on the issue, we are unable to address appellees David and Anita's reply point on exemplary damages which has been waived. *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982).

TRUST TERMINATION

David and Anita's cross points assert the trial court erred in overruling their motion for judgment declaring termination of the trust and in overruling their objection to the rendition of the judgment. David and Anita contend that at the time of submission of the case to the jury, all the parties' live pleadings on file pleaded for termination of the trust. If co-appellees wanted to change their pleadings, they could have moved for leave of court to amend their pleadings prior to the entry of judgment. David and Anita argue that it was too late for co-appellees to change their position at the hearing on entry of judgment. As a result, David and Anita objected to the entry of judgment proposed by the co-appellees for the reason that it did not order termination of the trust.

Supporting their argument for termination, David and Anita assert four general reasons for termination of the trust. First, they aver the trust itself stipulates the

terms of termination and those terms have been met.[6] Second, David and Anita contend that to completely deny termination now is not judicially economical. Third, they argue that in light of the appellant's insolvency, it is not inequitable for David and Anita to request an order terminating the trust. Moreover, they claim the duration of the trust was not intended to last until the beneficiaries' disputes and claims against each other were paid.

Co-appellees who initially pleaded for termination argue that their belief that all debts and taxes of the Estate had been paid, a condition precedent, turned out to be incorrect. Even as appellant's pleadings revealed, several claims against the Estate were still pending. Co-appellees further argue that the pleadings simply stated what the parties believed to be true and did not constitute judicial admissions. If the pleadings are contrary to the true state of the facts, they are not held as true legal conclusions or judicial admissions. *See Motor Inv. Co. v. City Hamlin*, 179 S.W.2d 278. 282 (Tex. 1944). The belief that the terms for terminating the trust had been met were erroneous as later reveal [sic] through the evidence.

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[6] The specific termination clause of the trust in question reads:

> This Trust shall terminate upon the expiration of one (1) calendar year following full, final, and complete settlement, payment, satisfaction and discharge of all debts, claims, and taxes, including income, gift and estate and inheritance taxes, and penalties and interest thereon, if any, assessed and asserted against the Estate of HARRY LEE CARTER, Deceased, and/or the Beneficiaries thereof.

A claim against a beneficiary, which was an expressed condition precedent, remained.

The claims that the condition precedents had been met for termination of the trust were not binding. *See Motor Inv. Co.*, 179 S.W.2d a: :82. The evidence presented at trial without objection established the purpose of the trust had not been completely fulfilled. Consequently, the trial court did not error [sic] in refusing to terminate the trust. We overrule appellees David and Anita's cross points on trust termination and their objection to the rendition of the judgment.

Accordingly, we affirm the judgment of trial court.

ORLANDO GARCIA

Justice

DO NOT PUBLISH

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The Honorable Franklin S. Spears
Branton & Hall
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Mr. T. Kellis Dibrell
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515 Busby Drive
San Antonio, TX 78209

Mr. Timothy Bryan Smith
Smith Neal & Karam
Trinity Plaza II
745 E. Mulberry, Suite 490
San Antonio, TX 78212

RE: Case No. D-4587
Style: CLYDE T. CARTER
v. HARRY LEE CARTER ESTATE MANAGEMENT TRUST ET AL.

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied".

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Michael C. Murphey
Michael C. Murphey,
Deputy Clerk

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

June 8, 1994

Mr. Michael A. Hatchell
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Smith Neal & Karam
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San Antonio, TX 78212

DISPOSITION

The judgment is affirmed, and it is our view that this case comes perilously close to being a frivolous appeal.

NOT FOR PUBLICATION

/s/ McDaniel
J.*

We concur:

/s/ Ramirez
P. J.

/s/ Dabney
J.

*Retired Associate Justice of the Court of Appeal, Fourth District, senior judge status (Gov. Code, § 75028.1), sitting under assignment by the Chairperson of the Judicial Council.

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

FILED
MAR 23, 1994
Court of Appeal
Fourth District

LAWRENCE F. BROWN,
Plaintiff and Appellant,
v.
NATIONAL MEDICAL ENTERPRISES, INC., et al.,
Defendants and Respondents.

E010073
(Super.Ct.No. RCV47045)

MODIFICATION OF OPINION AND DENIAL OF PETITION FOR REHEARING

The petition for rehearing is denied. Modification of the opinion heretofore filed in this case on February 22, 1994, is made as follows:

1. On page 17:
line 14, change "his" to "Jenkins' ";
line 22, delete "Faber's or" and change "depositions" to "deposition";
line 24, delete "(but not Faber's)."

2. On page 18:
lines 15-19, delete the sentence "In this separate . . . Dr. Shapiro."

3. On page 29:

lines 5-7, delete the sentence "However . . . *on appeal*";

line 7, delete "Moreover," and change "plaintiff's" to "Plaintiff's";

line 14, after "However," insert "plaintiff"; delete "even . . . unauthenticated";

line 15, omit "version . . . he."

Except for the modification of the language hereinabove set forth, the opinion previously filed remains unchanged.

NOT FOR PUBLICATION

/s/ McDANIEL
J.*

We concur:

/s/ RAMIREZ
P. J.

/s/ DABNEY
J.

*Retired Associate Justice of the Court of Appeal, Fourth District, senior judge status (Gov. Code, § 75028.1), sitting under assignment by the Chairperson of the Judicial Council.

APPENDIX B

FOURTH APPELLATE DISTRICT
DIVISION TWO, No. E010073
S039075

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

SUPREME COURT
FILED
MAY 11 1994
Robert Wandruff Clerk

Deputy

LAWRENCE F. BROWN,
Appellant
v.
NATIONAL MEDICAL ENTERPRISES INCORPORATED Et Al.,
Respondents

Appellant's petition for review DENIED.

LUCAS
Chief Justice

APPENDIX C

Dummit, Faber & Brown
Attorneys at Law
11755 Wilshire Boulevard, 15th Floor
Los Angeles, California 90025
Telephones (213) 879-1024
(213) 479-0944
Attorneys for Defendants, National Medical Enterprises, Inc., NME Hospitals, Inc. dba Doctors Hospital of Montclair and Kevin Jenkins, D.O.

Received
4 / 6-13-91
Dept / Date
ML
(Initials)

F I L E D - West District
San Bernardino County Clerk
JUN 17 1991
By /s/
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

LAWRENCE F. BROWN, M.D.,
Plaintiff,

-vs-

NATIONAL MEDICAL ENTERPRISES, INC., DOCTORS HOSPITAL OF MONTCLAIR, INC., KEVIN JENKINS, D.O. DOES I through X, and CORPORATE DOES XI through XX,
Defendants.

Case No. RCV 470-45
ORDER GRANTING SUMMARY JUGMENT

The Motion of Defendants, NATIONAL MEDICAL ENTERPRISES, INC., NME HOSPITALS, INC. dba DOCTORS HOSPITAL OF MONTCLAIR and KEVIN JENKINS, D.O., for Summary Judgment or, in the Alternative, Summary Adjudication of Issues, came regularly on before the court on May 15, 1991 in Department RCV "4" of the Superior Court for the County of San Bernardino, the

Honorable William Pitt Hyde, Judge Presiding. Appearing as attorneys were Christopher J. Faber, Esq. of Dummit Faber & Brown, attorneys for Defendants, NATIONAL MEDICAL ENTERPRISES, INC., NME HOSPITALS, INC. dba DOCTORS HOSPITAL OF MONTCLAIR and KEVIN JENKINS, D.O., and Gerald Gottlieb, Esq. representing Plaintiff, Lawrence F. Brown, M.D.

After considering the papers filed in support of and in opposition to the motion and after hearing oral argument, the court took the matter under submission and on June 4, 1991, ruled in its Minute Order of that date as follows:

1. That the court finds that the evidence by way of declarations and exhibits filed in support of Defendants' Motion for Summary Judgment establishes that the material facts as set forth in Defendants' Separate Statement of Undisputed Facts are undisputed and that no triable issue of material fact exists warranting trial in this matter as to each cause of action alleged by Plaintiff in support of his action.

IT IS THEREFORE ORDERED that:

1. Defendants' Motion for Summary Judgment be granted.

2. Judgment be entered in favor of Defendants and against Plaintiff, LAWRENCE F. BROWN, M.D.

DATED: JUN 17 1991

/s/ William Pitt Hyde
Judge of the Superior Court

[The Proof of Service form dated 6/11/91 is not included in this appendix.]

Dummit, Faber & Brown
Attorneys at Law
11755 Wilshire Boulevard, 15th Floor
Los Angeles, California 90025
Telephones (213) 879-1024
(213) 479-0944
Attorneys for Defendants, National Medical Enterprises, Inc., NME Hospitals, Inc. dba Doctors Hospital of Montclair and Kevin Jenkins, D.O.

Received
4 / 6-13-91
Dept / Date
ML
(Initials)

FILED - West District
San Bernardino County Clerk
JUN 17 1991
By /s/
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

LAWRENCE F. BROWN, M.D.,
Plaintiff,

-vs-

NATIONAL MEDICAL ENTERPRISES, INC., DOCTORS HOSPITAL OF MONTCLAIR, INC., KEVIN JENKINS, D.O. DOES I through X, and CORPORATE DOES XI through XX,
Defendants.

Case No. RCV 470-45
JUDGMENT ON MOTION
FOR SUMMARY JUGMENT

On June 4, 1991, the court granted the Motion for Summary Judgment of Defendants, NATIONAL MEDICAL ENTERPRISES, INC., NME HOSPITALS, INC. dba DOCTORS HOSPITAL OF MONTCLAIR and KEVIN JENKINS, D.O.

IT IS ORDERED THAT:

1. Plaintiff take nothing by way of his Complaint or Amendments thereto.

DATED: 6/17/91

/s/ William Pitt Hyde
Judge of the Superior Court

[The Proof of Service form dated 6/11/91 is not included in this appendix.]

Dummit, Faber & Brown
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11755 Wilshire Boulevard, 15th Floor
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(213) 479-0944
Attorneys for Defendants, National Medical Enterprises, Inc., NME Hospitals, Inc. dba Doctors Hospital of Montclair and Kevin Jenkins, D.O.

F I L E D - West District
San Bernardino County Clerk
JUL 10 1991
By Karen Beckler
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

LAWRENCE F. BROWN, M.D.,
Plaintiff,

-vs-

NATIONAL MEDICAL ENTERPRISES, INC., DOCTORS HOSPITAL OF MONTCLAIR, INC., KEVIN JENKINS, D.O. DOES I through X, and CORPORATE DOES XI through XX,
Defendants.

Case No. RCV 470-45
JUDGMENT ON MOTION
FOR SUMMARY JUDGMENT

On June 4, 1991, the court granted the Motion for Summary Judgment of Defendants, NATIONAL MEDICAL ENTERPRISES, INC., NME HOSPITALS, INC. dba DOCTORS HOSPITAL OF MONTCLAIR and KEVIN JENKINS, D.O.

IT IS ORDERED THAT:

1. Plaintiff take nothing by way of his Complaint or Amendments thereto.

DATED: 7/10/91

/s/ William Pitt Hyde
Judge of the Superior Court

[The Proof of Service form dated 7/9/91 is not included in this appendix.]

Dummit, Faber & Brown
Attorneys at Law
11755 Wilshire Boulevard, 15th Floor
Los Angeles, California 90025
Telephones (213) 879-1024
(213) 479-0944
Attorneys for Defendants, National Medical Enterprises, Inc., NME Hospitals, Inc. dba Doctors Hospital of Montclair and Kevin Jenkins, D.O.

F I L E D - West District
San Bernardino County Clerk
JUL 10 1991
By Karen Beckler
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

LAWRENCE F. BROWN, M.D.,
Plaintiff,

-vs-

NATIONAL MEDICAL ENTERPRISES, INC., DOCTORS HOSPITAL OF MONTCLAIR, INC., KEVIN JENKINS, D.O. DOES I through X, and CORPORATE DOES XI through XX,
Defendants.

Case No. RCV 470-45
ORDER GRANTING SUMMARY JUGMENT

The Motion of Defendants, NATIONAL MEDICAL ENTERPRISES, INC., NME HOSPITALS, INC. dba DOCTORS HOSPITAL OF MONTCLAIR and KEVIN JENKINS, D.O., for Summary Judgment or, in the Alternative, Summary Adjudication of Issues, came regularly on before the court on May 15, 1991 in Department RCV "4" of the Superior Court for the County of San Bernardino, the

Honorable William Pitt Hyde, Judge Presiding. Appearing as attorneys were Christopher J. Faber, Esq. of Dummit Faber & Brown, attorneys for Defendants, NATIONAL MEDICAL ENTERPRISES, INC., NME HOSPITALS, INC. dba DOCTORS HOSPITAL OF MONTCLAIR and KEVIN JENKINS, D.O., and Gerald Gottlieb, Esq. representing Plaintiff, Lawrence F. Brown, M.D.

After considering the papers filed in support of and in opposition to the motion and after hearing oral argument, the court took the matter under submission and on June 4, 1991, ruled in its Minute Order of that date as follows:

1. That the court finds that the evidence by way of declarations and exhibits filed in support of Defendants' Motion for Summary Judgment establishes that the material facts as set forth in Defendants' Separate Statement of Undisputed Facts are undisputed and that no triable issue of material fact exists warranting trial in this matter as to each cause of action alleged by Plaintiff in support of his action.

IT IS THEREFORE ORDERED that:

1. Defendants' Motion for Summary Judgment be granted.

2. Judgment be entered in favor of Defendants and against Plaintiff, LAWRENCE F. BROWN, M.D.

DATED: 7/10/91

/s/ William Pitt Hyde
Judge of the Superior Court

[The Proof of Service form dated 7/9/91 is not included in this appendix.]

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Attorneys at Law
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Los Angeles, California 90025
Telephones (213) 879-1024; (213) 479-0944
Attorneys for Defendants, National Medical Enterprises, Inc., NME Hospitals, Inc. dba Doctors Hospital of Montclair and Kevin Jenkins, D.O.

FILED - West District
San Bernardino County Clerk
JUL 12 1991
By /s/ Dawn L. Warnock
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

LAWRENCE F. BROWN, M.D.,
Plaintiff,

-vs-

NATIONAL MEDICAL ENTERPRISES, INC., DOCTORS HOSPITAL OF MONTCLAIR, INC., KEVIN JENKINS, D.O. DOES I through X, and CORPORATE DOES XI through XX,
Defendants.

Case No. RCV 470-45

NOTICE OF ENTRY OF JUDGMENT

PLEASE TAKE NOTICE that judgment in this case was entered in favor of Defendants on June 17, 1991.

DATED: July 11, 1991

DUMMIT, FABER & BROWN

By: /s/ Christopher J. Faber
Christopher J. Faber
Attorneys for Defendants, National Medical Enterprises, Inc., NME Hospitals, Inc. dba Doctors Hospital of Montclair and Kevin Jenkins, D.O.

APPENDIX D

HEALTH CARE QUALITY IMPROVEMENT ACT OF 1986 [42 U.S.C.A. § 11101 *et seq.*]

Chapter 117 — Encouraging Good Faith Professional Review Acitvities

§ 11101. Findings

The Congress finds the following:

(1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.

(2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discover of the physician's previous damaging or incompetent performance.

(3) This nationwide problem can be remedied through effective professional peer review.

(4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.

(5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

(Pub.L. 99-660, Title IV, § 402, Nov. 14, 1986, 100 Stat. 3784.)

§ 11111. Professional review

(a) In general

(1) Limitation on damages for professional review actions

If a professional review action (as defined in section 11151(9) of this title) of a professional review body meets all

the standards specified in section 11112(a) of this title, except as provided in subsection (b) of this section —

(A) the professional review body,

(B) any person acting as a member or staff to the body,

(C) any person under a contract or other formal agreement with the body, and

(D) any person who participates with or assists the body with respect to the action,

shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action. The preceding sentence shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. and the Civil Rights Acts, 42 U.S.C. 1981 et seq. Nothing in this paragraph shall prevent the United States or any Attorney General of a State from bringing an action, including an action under section 4C of the Clayton Act, 15 U.S.C. § 15C [15 U.S.C.A. § 15c], where such an action is otherwise authorized.

(2) Protection for those providing information to professional review bodies

Notwithstanding any other provision of law, no person (whether as a witness or otherwise) providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable in damages under any law of the United States or of any State (or political subdivision thereof) unless such information is false and the person providing it knew that such information was false.

(b) Exception

If the Secretary has reason to believe that a health care entity has failed to report information in accordance with section 11133(a) of this title, the Secretary shall conduct an investigation. If, after providing notice of noncompliance,

an opportunity to correct the noncompliance, and an opportunity for a hearing, the Secretary determines that a health care entity has failed substantially to report information in accordance with section 11133(a) of this title, the Secretary shall publish the name of the entity in the Federal Register. The protections of subsection (a)(1) of this section shall not apply to an entity the name of which is published in the Federal Register under the previous sentence with respect to professional review actions of the entity commenced during the 8-year period beginning 30 days after the date of publication of the name.

(c) Treatment under State laws

(1) Professional review actions taken on or after October 14, 1989

Except as provided in paragraph (2), subsection (a) of this section shall apply to State laws in a State only for professional review actions commenced on or after October 14, 1989.

(2) Exceptions

(A) State early opt-in

Subsection (a) of this section shall apply to State laws in a State for actions commenced before October 14, 1989, if the State by legislation elects such treatment.

(B) Effective date of election

An election under State law is not effective, for purposes of,[1] for actions commenced before the effective date of the State law, which may not be earlier than the date of the enactment of that law.

(Pub.L. 99-660, Title IV, § 411, Nov. 14, 1986, 100 Stat. 3784; Pub.L. 100-177, Title IV, § 402(c), as added Pub.L. 101-239, Title VI, § 6103(e)(6)(A) Dec. 19, 1989, 103 Stat. 2208.)

---

[1] So in original.

§ 11112. Standards for professional review actions

(a) In general

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken —

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

(b) Adequate notice and hearing

A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) Notice of proposed action

The physician has been given notice stating —

(A)(i) that a professional review action has been proposed to be taken against the physician,

(ii) reasons for the proposed action,

(B)(i) that the physician has the right to request a hearing on the proposed action,

(ii) any time limit (of not less than 30 dayys) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing

If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating —

(A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice

If a hearing is requested on a timely basis under paragraph (1)(B) —

(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity) —

(i) before an arbitrator mutually acceptable to the physician and the health care entity,

(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or

(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;

(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

(C) in the hearing the physician involved has the right —

(i) to representation by an attorney or other person of the physician's choice.

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,

(iii) to call, examine, and cross-examine witnesses,

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

(v) to submit a written statement at the close of the hearing; and

(D) upon completion of the hearing, the physician involved has the right —

(i) to receive the written recommendation of the arbitrator, office, or panel, including a statement of the basis for the recommendations, and

(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, it itself, constitute failure to meet the standards of subsection (a)(3) of this section.

(c) Adequate procedures in investigations or health emergencies

For purposes of section 11111(a) of this title, nothing in this section shall be construed as —

(1) requiring the procedures referred to in subsection (a)(3) of this section —

(A) where there is no adverse professional review action taken, or

(B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or

(2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

(Pub.L. 99-660, Title IV, § 412, Nov. 14, 1986, 100 Stat. 3785.)

APPENDIX E

GERALD H. GOTTLIEB
Attorney at Law
10933 Wellworth Avenue
Los Angeles, California 90024
Telephone (310) 273-7550
Facsimile (310) 273-7550

The Presiding Justice and Associate Justices,
Court of Appeal, State of California,
Fourth Appellate District, Division Two,
303 West Fifth Street, San Bernardino, CA 92401.
January 10, 1994

Subject: Appeal No. E010073, Lawrence F. Brown, M.D. v. National Medical Enterprises, Inc., et al. — Appeal from Summary Judgment: Motion: Letter requesting Permission to File Supplementary Letter-Brief in Response to the Tentative Opinion; Declaration; Authorities; re-lodging of deposition volumes; request for Judicial Notice of the Exhibits Volume Two of Response to Summary Judgment Motion).

Honorable Presiding Justice and Associate Justices:

With deference, and appreciating the procedure of supplying the Tentative Opinion, appellant believes that a series of misunderstandings beset the instant Tentative Opinion and that the main causes are: (1) the apparent unavailability to this Court of the exhibits of the Exhibits Volume (Volume Two of Plaintiff's Response to the Motion for Summary Judgment) which contains 35 exhibits) and (2) the apparent unavailability of the depositions of defendant Jenkins (Volumes I and II), Forrester (Volume II) and Leyhe (one volume) — even though each of those volumes was respectively lodged and served, and each designated for inclusion in the Clerk's Transcript viz, in the Record on Appeal.

Plaintiff filed Volume Two of his Response to the Motion for Summary Judgment, and lodged all of said deposition volumes with the trial court clerk. Plaintiff designated all for inclusion in the Clerk's Transcript. CT 1469-1476, 1470 & CT 1472-3 (September 16, 1991), and CT 1478 (September 24, 1991) respectively designating:

Item 3, which designates for inclusion in the Clerk's Transcript "The lodged Deposition volumes of depositions of plaintiff (six volumes) Dr. Jenkins (two volumes), Mr. Forrester (two volumes), and Mr. Leyhe (one volume); and Plaintiff's further response to defendants' motion under California Code of Civil Procedure section 2031, and

Item 17 which designates for inclusion in the Transcript "Part Two [i.e., Volume Two, CT 1478], Table of Exhibits, and Exhibits, filed May 1, 1991"

Lodgings are shown at CT 903 (May 1, 1991) and CT 1176 (May 7, 1991).

By these designations, said volumes, of exhibits and of depositions, became parts of the Clerk's Record on Appeal. Rule 4.5 CLERK'S RECORD ON APPEAL — DEFINITION.

The Tentative Opinion indicates that those volumes of the Clerk's Record on Appeal never reached this Court. Therefore appellant on receiving it hastened to provide the deposition volumes all over again, and also prepared the enclosed Supplementary Letter Brief to clear up various misunderstandings. The work has occupied this counsel's full time since receipt of the Tentative Opinion.

Appellant asks the Court to consider the contents of the Letter Brief as grounds for vacating the summary judgment and remanding the case for completion of trial preparation and trial.

Appellant on these grounds moves for an order permitting the enclosures to be lodged and the Letter Brief be filed and received, and judicial notice be taken of the aforesaid location of the Exhibits Volume filed May 1, 1991.

Specifically, Appellant respectfully further requests and moves this Court to take judicial notice under Evidence Code section 452 subsection (h), that Volume Two (Exhibits) Plaintiff's Response to the Motion for Summary Judgment has been and is available to the Court in the Central Court Appeals Division, and that the certified copies or duplicate original of depositions of Forrester (two volumes), Jenkins (two volumes) and Leyhe (one volume) together with a copy, uncertified, of the deposition exhibits volume, are herewith transmitted to and lodged directly with this Court. (Forrester volume I is in Clerk Transcript volume VII.)

The letter-brief consists of 18 PARTS dealing respectively with 18 passages from the Tentative Opinion, of which PART TWO consists of 11 sub-parts. Thus the Letter-brief, of 55 pages plus a declaration and authorities, averages about 2 pages per topic.

Appellant apologizes for the length of the Supplement and requests permission under Rule 15 to exceed the length limit prescribed therein.

Respectfully submitted,

Gerald H. Gottlieb
Attorney for Lawrence F. Brown, M.D.,
Plaintiff and Appellant

Enclosure: Proposed order, Depositions, Letter Brief, Exhibits and compilation of deposition parts and exhibits cited.

APPENDIX F

PACIFIC PHYSICIAN SERVICES

. . . health care you can live with

December 15, 1987

PERSONAL AND CONFIDENTIAL

Dear Dr. Brown:

Thank you for your letter of November 16, 1987 indicating your willingness to continue to provide professional radiology services on behalf of Vineyard Medical Group at Doctors Hospital of Montclair.

I understand from your letter that you remain a staff radiologist at Doctors Hospital of Montclair willing and able to provide services for our group.

Pursuant to your request, Leon Pettijohn of our office has been in touch with Mr. Forrester, Chief Executive Office of Doctors Hospital of Montclair and he has indicated that he would not be able to allow you to provide radiological services on behalf of Vineyard Medical Group for outpatient and inpatient radiological procedures at Doctors Hospital of Montclair. He advised us to contact Dr. Shipiro, the new radiology contractor at the hospital.

Thank you very much for your interest in continuing to be of service to Vineyard Medical Group.

Very cordially yours,

/s/ Ronald D. Lossett

Ronald D. Lossett, PhD., CPA

RDL/cld

c2drbrown

12 North Fifth Street • Redlands, California 92373 • (714) 825-4401

APPENDIX G

The Matter of Race

[Excerpt from Clerk's Transcript, being part of petitioner's sworn (penalty of perjury) Declaration consisting of his Answer to respondents' Interrogatories. As CT 1072-1074, it is part of Petitioner's Response to Respondent's Motion for Summary Judgment]

The Plaintiff is black. The medical staff included a considerable number of black physicians. [Yet no] blacks were on the "committee" which NME's Forrester and Dr. Jenkins selected.

Plaintiff is informed and believes that he is the only physician ever fired from the Doctors' Hospital of Montclair in the history of that hospital (except a certain physician who had lost his license to practice). Plaintiff's ouster was specified to be without cause.

The only physician who was ever made the head of a department and then brought down by another balloting and removed from the chairmanship, was another black physician.

[T]he late Director of Radiology Dr. Sturr, whom plaintiff joined as co-director before the latter's death, stated to plaintiff that he must remember that he is "a black man in a white man's society," referring to the hospital.

Defendants ousted plaintiff, even though he was doubly boarded, in radiology and nuclear medicine. . . .

No black radiologist was interviewed by the "committee," to take plaintiff's place. [NME's Regional Vice President] Leyhe did not raise the question to either Jenkins or Forrester as to why the "committee" did not have among its members a black physician. (Deposition of Leyhe p. 106) Forrester could not recall whether he raised the matter or not:

> Q. Did you consider having a black on the radiology committee?
>
> A. Did I what? A black?

Q. A black physician . . . .

A. I did discuss with Dr. Jenkins who I felt would be appropriate to sit on a committee, but he decided to appoint those members from an executive committee that he had held . . . .

Q. Did you recommend to him or suggest to him that there should be a black physician on the subcommittee?

A. I don't recall whether I made that recommendation." Forrester II, pp. 177-81

Defendants' conduct, of severing plaintiff without cause and not affording him the established rights and procedures prescribed and required by the bylaws including e.g. notice, impartial hearing body, etc., . . . shows plaintiff . . . believes, that defendants were motivated by race prejudice. . . .

As mentioned, his presence and labors had brought him to election to the Presidency and to several terms on the Board, and his Department earned the top rating given by the Joint Commission on Accreditation of Hospitals. His radiological - clinical experience was vast. . . .

The ouster of plaintiff occurred just after the departure of Dr. Filler, the physician who had sponsored plaintiff for the post of Radiologist and Director years before.

Plaintiff is informed and believes that defendants' conduct was mainly or largely motivated by racial prejudice and animus.

Defendants have declined to provide documents or information on the subject of racial patterns pertaining within NME nationally and locally in the selection and retention of black radiologists as heads of departments, and have sought to prevent plaintiff from taking depositions of NME's top officers who would have the authority to bring such documents from any part of the organization — under process which would require them as, e.g., to bring and disclose such documents and information as pertain to that subject. Plaintiff . . . believes that those officers at the

command and policy levels know these racial patterns, of the corporate defendant, and have access to the documentation thereof. These refusals and this resistance raises the inference that the information which said documents and testimony would disclose, would be adverse to the defendants.

(2) 94-259

No.

Supreme Court, U.S.
FILED
AUG 24 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LAWRENCE F. BROWN, M.D.,
Petitioner,
vs.
NATIONAL MEDICAL ENTERPRISES,
NME HOSPITALS, INC. and KEVIN JENKINS, D.O.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION TWO

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI

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No. _____

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SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI

The *Fobbs* decision, attached as an Appendix hereto, issued by the Ninth Circuit Court of Appeals on July 19, 1994, came to petitioner's attention after his Petition for Writ of Certiorari filed August 9, 1994, came ready for filing from the printer. Because the case has manifold bearing on the Petition and the instant case, petitioner, pursuant to Rule 15.7 of this Court, submits this Supplemental Brief.

DATED: August 24, 1994.

GERALD H. GOTTLIEB

Counsel of Record for
LAWRENCE F. BROWN, M.D.

NEW SUPPORT FOR GRANTING CERTIORARI

I.

NEW FEDERAL CASE LAW SHOWS THAT THE CIVIL RIGHTS COUNT (CAUSE OF ACTION THREE OF THE PETITIONER'S AMENDED COMPLAINT) SHOULD HAVE SURVIVED — EVEN IF A HEARING, WHICH RESPONDENTS REFUSED, *HAD* BEEN PROVIDED.

Decided a few weeks ago, *Fobbs v. Holy Cross Health System*, 94 [Los Angeles] Daily Journal D.A.R. 10097, July 20, 1994, parallels the Health Care Quality Improvement Act (HCQIA) of 1986, Certiorari Petition Appendix D, to provide further concrete reasons for granting certiorari. The HCQIA provides that if a proper and sufficient hearing is provided, the physician may not pursue his damage action. However, the statute then states that "the preceeding sentence shall not apply to damages under any law of . . . any state relating to the civil rights of any person or persons. . . ." (Petition Appendix D-2).

Fobbs shows that even where the hospital and medical staff do provide a proper and sufficient peer review hearing, the physician may pursue his damage suit for violation of his civil rights.

> "We hold that Dr. Fobbs in his Title VI claim has sufficiently alleged personal racial discrimination, and the dismissal of the district court on that issue is reversed. . . ." (*Id.*, Supplemental Appendix A-16).

The Ninth Circuit *Fobbs* decision stands in direct conflict to the instant decision of the California Court of Appeal which terminated the civil rights count of the amended complaint. And *Fobbs* further supports the petitioned grant

of certiorari by its physician's civil rights holding which in essence also indicates that the federal statute operates as a sword as well as a shield: that the statute protects the physicians right to sue for damages if a given provision of the statute does not immunize the hospital. Here the hospital withheld a hearing, wherefore the federal case and the federal statute show that this petitioner's suit should be allowed to proceed.

II.

UNDER FEDERAL LAW, LACK OF DANGER NEGATES AND LEAVES NO EXCUSE FOR NOT PROVIDING A HEARING. DR. FOBBS COLORABLY CREATED DANGER, BUT IN THE *INSTANT* CASE THERE WAS NONE. THUS THE NEW *FOBBS* DECISION SHOWS WHAT *SHELLEY* PLUS STATE ACTION SHOWS, THAT THE INSTANT SUMMARY OUSTER CLASHES WITH FEDERAL LAW.

As shown above, *Fobbs* is not dictum. It holds for Dr. Fobbs on his civil rights count.

But the *Fobbs* case also shows that where the physician creates no danger to any person — clearly the fact here — summary ouster or curtailment of privileges gives the physician a right to a hearing, and to damages if a hearing is denied.

In the instant case, there was no danger, and no evidence of such. The ouster was, and was stated to be, without cause. The reason given by respondents for the summary ouster of this petitioner from his privileges and department was not danger, but that he had lost business (a charge never made to petitioner, never demonstrated, and beyond the admissible criteria of grounds for termination even had there been a hearing).

Reinforced by the *Fobbs* ruling, a direct conflict starkly exists between the federal law and the misguided ruling by the California Court of Appeal. Clearly now and federally, where the physician generates no danger the denial of a hearing bottoms the action for damages. Petition Appendix D-7.

In short, where no danger existed to any person, and no hearing was held, as here, the physician has the right to damages. The *Fobbs* opinion, applying the aforesaid Health statute, makes this clear. Again a direct conflict exists between the federal law and the ruling by the court of appeal.

III.

THE NINTH CIRCUIT'S OPINION SEEMS TO CONCUR WITH DR. FOBBS — THAT THE PHYSICIAN'S CLINICAL PRIVILEGES COME UNDER THE PROTECTION OF ALSO UNITED STATES CONSTITUTION ARTICLE IV, § 2.

Stating that ". . . Dr. Fobbs has identified the practice of medicine as a privilege under Article IV, § 2 of the Constitution," the Ninth Circuit appears to agree. *Fobbs* (Supplemental Appendix A-19-21 last six paragraphs). Petitioner argued to the court below that his privileges and status as radiologist at the hospital were constitutionally protected. The question, of whether this is actually so, is an important one that should be examined and determined by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: August 24, 1994.

Respectfully submitted,

GERALD H. GOTTLIEB

Counsel of Record for
LAWRENCE F. BROWN, M.D.

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENARD M. FOBBS, M.D.,
Plaintiff-Appellant,

v.

HOLY CROSS HEALTH SYSTEM CORPORATION, a California corporation, doing business as SAINT AGNES HOSPITAL and MEDICAL CENTER; CYNTHIA BERGMANN, M.D.; JAMES CAHILL, M.D.; JAY CHRISTENSEN, M.D.; CHARLES GAVIN, M.D.; SEUNG NAM KIM; ROBERT MELTVEDT, M.D.; MARSHALL NOEL, M.D.; MORTON ROSENSTEIN, M.D.; ROYDON STEINKE, M.D.; ROBERT WILSON, M.D.; LARRY E. NIX,
Defendants-Appellees.

No. 92-15852
D.C. No.
CV 89-682 REC
OPINION

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, Chief Judge, Presiding

Argued and Submitted
April 12, 1994—San Francisco, California

Filed July 19, 1994

Before: Betty B. Fletcher, Warren J. Ferguson, and Stephen S. Trott, Circuit Judges.

Opinion by Judge Ferguson

OPINION

FERGUSON, Circuit Judge:

Plaintiff Denard M. Fobbs, M.D. seeks judgment against defendant St. Agnes Hospital and Medical Center ("St. Agnes" or "hospital") and various individual physician defendants who were on the Medical Staff and served on various peer review committees at the hospital for the summary suspension of his staff privileges.

In 1987, Dr. Fobbs, an African American, was granted privileges by the hospital to perform intra-abdominal laser surgery as a member of the Department of Obstetrics-Gynecology/Perinatology. After the hospital summarily suspended these privileges on September 29, 1989, Dr. Fobbs filed a complaint against defendant Holy Cross Health Systems Corporation, its subsidiary Saint Agnes Hospital, and twenty-seven individual defendant physicians.

After a series of motions and amendments, Dr. Fobbs' second amended complaint consisted of various allegations involving civil rights and antitrust violations.

This appeal involves the following specific claims in that complaint: the first claim pursuant to the Sherman Antitrust Act, 15 U.S.C. § 2; the second claim pursuant to 42 U.S.C. § 1981; the third claim pursuant to Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, against Saint Agnes Hospital only; and the fourth claim pursuant to 42 U.S.C. § 1985(3).

On August 20, 1990, the district court granted the physician defendants' motion to dismiss the § 1985 claim and granted the hospital's motion to dismiss the Title VI claim.

On November 25, 1990, the court granted physician defendants' motion for partial summary judgment as to the § 1981 claim on the basis that it was time-barred.

On March 17, 1992, the court granted summary judgment in favor of all defendants on the Sherman Antitrust Act claim, holding that they were immune from federal antitrust liability by virtue of the provisions of the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. § 11101, *et seq.*

I. *DISCUSSION*

A. *Sherman Antitrust Act Claim*

The district court has published its order granting defendants' motion for summary judgment on the Sherman Antitrust Act claim. *Fobbs v. Holy Cross Health System Corp., et al.*, 789 F. Supp. 1054 (E.D. Cal. 1992).

We affirm the district court's order with the following addition to its opinion, which affects section V.A.3. set forth on pages 1067 and 1068 relating to whether the summary monitoring restraints prior to any notice or hearing violated the HCQIA.

[1] A review committee may immediately suspend or restrict clinical privileges "subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual." 42 U.S.C. § 11112(c)(2). We agree that the summary restrictions of Dr. Fobbs' clinical privileges by means of the monitoring requirements meet the requirements of § 11112(c)(2).

Dr. Fobbs was the only physician in the Central Valley of California at the time performing laser surgery in obstetrics cases. After he performed a few such surgeries, questions were raised by the defendants as to possible irregularities with respect to three cases. The Supervisory Committee at the hospital invited Dr. Fobbs to discuss these cases. As a result of this meeting, copies of the case charts were sent for analysis

and review to Dr. Donald R. Ostergard, Professor of Obstetrics and Gynecology at the University of California, Irvine, who was a former teacher of Dr. Fobbs.

Dr. Ostergard submitted a response in which he concluded that there were difficulties relating to responsibilities of both Dr. Fobbs and hospital employees. In the first case, there was improper functioning of the laser equipment. In that case, Dr. Ostergard criticized the hospital nursing staff for failing to calibrate the laser equipment before the surgery and failing to notify Dr. Fobbs of the equipment malfunction. He also concluded, however, that Dr. Fobbs used poor judgment in leaving the laser patient under anesthesia to deliver another obstetrical patient. In the second case, he concluded that Dr. Fobbs performed an unnecessary dilatation and curettage. Regarding the third patient, Dr. Ostergard reported that there was a lack of judgment on Dr. Fobbs' part in performing vaporization of endometriosis. Finally, he reported that these patients did not have a written or dictated history and physical examination on their charts at the time of the laser procedures.

Shortly after Dr. Ostergard's report was received, Dr. Fobbs wrote to the hospital, setting forth a conversation he had with Dr. Ostergard and claiming that he had done no wrong. The Supervisory Committee recommended to the Medical Executive Committee ("MEC") that monitoring be imposed. The following monitoring restrictions were then summarily imposed:

> (1) Plaintiff was to have a second opinion on every admission to St. Agnes Medical Center;
>
> (2) This was to include a history and physical examination by the monitor;
>
> (3) On any surgical procedures, the monitor was to be present during the operation;

(4) The follow-up care of the patient was to be shared with the monitor; and

(5) The monitors were to be members of the Ob-Gyn/Perinatology Supervisory Committee.

Dr. Fobbs contends that the statute requires that there be "imminent danger to the health of any individual" before there may be a summary restriction. However, the statute does not require imminent danger to exist before a summary restraint is imposed. It only requires that the danger *may* result if the restraint is not imposed.

[2] The record of the problems caused by Dr. Fobbs clearly supports the conclusion of the MEC that a summary restriction be taken to avoid imminent danger. Dr. Fobbs was not suspended, his practice was not limited, and his access to the hospital was not limited. The monitoring conditions were necessary in light of the past history of Dr. Fobbs and his laser surgery. The defendants had ample medical justification to take the steps. The district court correctly granted defendants HCQIA immunity with respect to the summary monitoring restrictions.

We address in more detail the three other claims of Dr. Fobbs' complaint as they are not included in the published opinion of the district court.

B. *42 U.S.C. § 1981 Claim*

Dr. Fobbs alleges that defendants deprived him of his rights under 42 U.S.C. § 1981, which confers upon "[a]ll persons . . . the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens," in suspending his staff privilege without just cause or due process.

[3] The MEC decided to summarily suspend Dr. Fobbs on August 26, 1987. Dr. Fobbs received notification on

August 29, 1987. He did not file suit until September 29, 1988, over a year after receiving notification. Dr. Fobbs concedes that his § 1981 claim is subject to California Code of Civil Procedure § 340(3), California's one-year statute of limitations applicable to personal injury actions. He presents four theories, however, which he contends preserve his claim. We conclude that these theories are inadequate to save his claim.

1. *Date When Claim Accrued*

Dr. Fobbs contends that he is not precluded from bringing suit on this claim because the statute did not begin to run until September 30, 1988, the date on which he contends defendants' improper action became final. In the alternative, he argues the statutory period began October 10, 1988, the date of defendants' letter allegedly formalizing his suspension and denying his request for fair hearing conditions, which he contends was the last manifestation of defendants' allegedly continuing violation of § 1981.

"[A]lthough states' statutes of limitation apply [to § 1981 claims], federal law governs when the claim accrues and the limitation period begins to run." *Chung v. Pomona Valley Community Hosp.*, 667 F.2d 788, 791 (9th Cir. 1982) (citing *Cope v. Anderson*, 331 U.S. 461, 464 (1947)).

This case is governed by *Delaware State College v. Ricks*, 449 U.S. 250 (1980), in which the Supreme Court rejected a claim similar to Dr. Fobbs'. In *Ricks*, plaintiff filed suit under Title VII and 42 U.S.C. § 1981 against his employer, Delaware State College, after it denied him tenure. He then filed a grievance pursuant to internal administrative policy with the college Board of Trustees. Six months later, the Board notified Ricks that it denied his grievance.

Ricks contended that because he was granted a one-year "terminal" contract after being denied tenure, the applicable statute of limitation did not begin to run until the expiration

of the contract. The Court rejected this argument, concluding that Ricks' claim accrued the date the tenure decision was made and defendants notified Ricks. *Id.* at 259-60.

The Court also considered *amicus curiae* EEOC's argument that the statute of limitation did not begin to run until the Board of Trustees denied Ricks' grievance. The EEOC argued that the Trustees' initial decision to deny Ricks tenure was "only an expression of intent that did not become final until the grievance was denied." *Id.* at 260. The Court rejected this argument, stating that "entertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made." *Id.* at 261 (emphasis in original).

[4] Thus, Dr. Fobbs' contention that his claim did not accrue when the St. Agnes MEC notified him that his hospital privileges were being summarily suspended must fail.

2. *California's Equitable Tolling Doctrines*

Dr. Fobbs invokes California's equitable tolling doctrines to make two related contentions. First, he contends that this court should apply California's equitable tolling rule to the period during which he pursued his claim through the Office for Civil Rights ("OCR"), September 1988 to September 1989, because "he pursued in good faith a legal remedy designed to lessen the extent of his injury or damages." Second, Dr. Fobbs contends that the limitations period for his civil action was tolled during the time consumed by the internal hospital administrative proceedings "because during that period [he was] legally prevented from taking any action to protect his rights."

California's doctrine of equitable tolling allows a plaintiff to toll the state statute of limitations "when a person has 'sev-

eral formal legal remedies and reasonably and in good faith pursues one.' " *Donoghue v. Orange County*, 848 F.2d 926, 930 (9th Cir. 1987) (quoting *Jones v. Tracy School Dist.*, 27 Cal. 3d 99, 108, 611 P.2d 441, 445 (1980)). "The equitable tolling 'rule is not predicated upon the necessity of the completion of the one remedy as a prerequisite to the pursuit of the other.' " *Id.* (quoting *Myers v. Orange County*, 6 Cal. App. 3d 626, 635, 86 Cal. Rptr. 198, 203 (1970)). "The doctrine suspends the statute of limitations pending exhaustion of administrative remedies, even though no statute makes exhaustion a condition of the right to sue." *Id.* at 931.

There are three threshold matters plaintiff must overcome before he may benefit from California's equitable tolling doctrine. First, the tolling doctrines must not be "inconsistent with federal policy underlying the cause of action under consideration." *Id.* at 930 (citing *Chardon v. Fumero Soto*, 462 U.S. 650, 657 (1983)). *See also Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 119 (9th Cir. 1980) (§ 1981 action).

Second, where "plaintiff has pursued a remedy as to only one of several distinct wrongs," the equitable tolling doctrine does not apply to those other wrongs. *Donoghue*, 848 F.2d at 931 (citing *Arnold v. United States*, 816 F.2d 1306, 1312 (9th Cir. 1987)).

Finally, California law requires that a plaintiff fulfill three "core elements," that: (1) he gave timely notice to the defendant in filing the first claim; (2) defendant is not prejudiced in gathering evidence to defend against the second claim; and (3) plaintiff acted in good faith and with reasonable conduct in filing the second claim. *Id.* (citing *Collier v. City of Pasadena*, 142 Cal. App. 3d 917, 924, 191 Cal. Rptr. 681, 684-85 (1983)).

a. *Tolling Effect of the Pending Office for Civil Rights Inquiry*

[5] As discussed below, Dr. Fobbs fails to meet the threshold requirements to benefit from the equitable tolling doctrine. Thus, the running of the statute of limitations should not be tolled from September 1988 to September 1989, the period during which the OCR investigated Dr. Fobbs' claim.

1. *Inconsistency with Federal Policy*

Dr. Fobbs has made no showing that applying the equitable tolling doctrine to his § 1981 claim would not be inconsistent with federal policy.

2. *Remedies for Distinct Wrongs*

Dr. Fobbs argues that his Title VI grievance through the OCR addresses the same wrongs as his § 1981 claim in federal court because in both cases, he seeks to show that defendants have discriminated against him on the basis of his race by imposing monitoring and supervision requirements on him. *See Johnson v. Greater Southeast Community Hosp. Corp.*, 951 F.2d 1268, 1275 (D.C. Cir. 1991).

This issue is governed by *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). In *Railway Express Agency*, plaintiff filed charges with the EEOC, which over three years later notified him that he had a right to institute a Title VII civil action against his employer. In addition to his timely filed Title VII action, plaintiff also alleged violation of 42 U.S.C. § 1981. The Court held that plaintiff's § 1981 action was time-barred, even though plaintiff delayed bringing the § 1981 suit because he was waiting in good faith for the EEOC's recommendation.

The Court concluded that "the remedies available under Title VII and under § 1981, although related, and although

directed to most of the same ends, are separate, distinct, and independent." The court added that it would not, "in the face of congressional emphasis upon the existence and independence of the two remedies, . . . infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted, as, for example, a proscription of a § 1981 action while an EEOC claim is pending." *Id.* at 461.

[6] The same reasoning applies to this case. Dr. Fobbs pursued his claim with the OCR. Congress has not proscribed civil rights plaintiffs from filing § 1981 actions while an OCR investigation is pending. Furthermore, Dr. Fobbs has made only a conclusory showing, insufficient under *Railway Express Agency*, that the OCR procedures and his § 1981 claim were designed to address the same wrongs and grant the same remedies. *See Chambers v. Omaha Public School Dist.*, 536 F.2d 222, 230-31 (8th Cir. 1976) ("The remedies available under Title VI of the Civil Rights Act of 1964 on the one hand, and § 1981 and § 1983 on the other, are completely separate and independent.").

3. *California's Three "Core Elements"*

Dr. Fobbs has arguably met the three core elements required under California law. Nonetheless, because he fails to meet the first two threshold requirements, he is not entitled to toll the statute of limitation based on the pendency of his complaint before the OCR.

b. *Tolling Effect of the Internal Review Process*

Dr. Fobbs contends that he was required to complete his internal administrative remedies before he could initiate the instant civil suit. The Supreme Court has expressly rejected this argument. In *Delaware State College v. Ricks*, the EEOC argued as a fallback position that "even if the Board's first decision expressed its official position, . . . the pendency of

the grievance should toll the running of the limitations periods." 449 U.S. at 260-61. The Court summarily rejected this argument, stating, "we already have held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods." *Id.* at 261 (citing *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976)). Similarly, Dr. Fobbs argues that the running of the statute of limitation should be tolled during the period beginning August 29, 1987, the date he was notified of the suspension, and October 10, 1987, the date the MEC informed him that it would not conduct a hearing pursuant to his conditions. This contention fails under *Ricks*.

3. *Presence of a Continuing Violation*

Dr. Fobbs contends that he has alleged a continuing course of intimidation, harassment and disparate treatment culminating in defendants' October 10, 1988 finalization of his suspension and denial of his request for a fair hearing.

As defendants point out, however, beyond his conclusory allegation that the hearing procedure would have been "unfair," Dr. Fobbs has not alleged that "after August 26, 1988, he was treated differently than other Medical Staff members." Furthermore, Dr. Fobbs has not distinguished his case from *London v. Coopers & Lybrand*, where this court stated that "the natural effects of the allegedly discriminatory act are not regarded as 'continuing.' " 644 F.2d 811, 816 (9th Cir. 1981). Finally, Dr. Fobbs fails to show how defendants discriminated against him by adhering to St. Agnes bylaws in conducting their hearings and review process.

Thus, assuming there was a continuing violation, it ended on August 26, 1988, the date of Dr. Fobbs' summary suspension.

4. *Applicability of Estoppel Doctrine*

Finally, Dr. Fobbs contends that defendants should be estopped from invoking the statute of limitations as a defense, because Dr. Fobbs reasonably relied on defendants' communications, which led him to believe that the statute of limitations could not have begun to run until September 30, 1988. We disagree.

The district court found that the letter of MEC Chairman Dr. V. Roy Smith was neither fraudulent nor misleading and could not be construed as inducing Dr. Fobbs to refrain from bringing his action. The letter made no assertion regarding the statute of limitations nor when his possible legal actions would accrue. Furthermore, it is abundantly clear from the record that Dr. Fobbs did not believe anything the defendants wrote or said to him, and he certainly was not misled.

C. *Title VI Claim*

Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, provides in pertinent part that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial aid."

The district court dismissed Dr. Fobbs' Title VI claim against defendant St. Agnes on the ground that Dr. Fobbs did not sufficiently allege that he suffered racial discrimination, that he has third party standing, or that the suspension of his privileges necessarily causes discrimination against patients. This court reviews a dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) *de novo*. *Oscar v. University Students Co-op. Ass'n*, 965 F.2d 783, 785 (9th Cir.), *cert. denied*, 113 S. Ct. 655 (1992). We reverse.

1. *Pleading Requirements*

Dr. Fobbs contends that the district court erred in requiring him to plead that he was the intended beneficiary of a federally funded program in order to state a claim under 42 U.S.C. § 2000(d).

The district court incorrectly relied on *Doe on behalf of Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 420 (7th Cir. 1986), for the proposition that 42 U.S.C. § 2000(d) requires Dr. Fobbs to plead that he is the intended beneficiary of a federally funded program at St. Agnes. *St. Joseph's Hospital* is distinguishable because plaintiff in that case expressly argued that she *did not have to be a direct beneficiary* in order to assert a claim under § 2000(d). *Id.* Rather, she contended that the court should construe the Health and Human Services regulations to grant her a private cause of action. *Id.* Thus, *St. Joseph's Hospital* is completely inapposite to the case at hand.

To state a claim for damages under 42 U.S.C. § 2000(d), *et seq.*, a plaintiff must allege that (1) the entity involved is engaging in racial discrimination; and (2) the entity involved is receiving federal financial assistance. *Wrenn v. Kansas*, 561 F. Supp. 1216, 1221 (D.C. Kan. 1983) (citing *Jackson v. Conway*, 476 F. Supp. 896, 903 (E.D. Mo. 1979)). Although the plaintiff must prove intent at trial, it need not be pled in the complaint. *Wrenn*, 561 F. Supp. at 1221. *Compare Jackson*, 476 F. Supp. at 903 (no proof of intent is required if plaintiff seeks only injunctive relief).

[7] There is no requirement that plaintiff plead that he was an intended beneficiary of the federally funded program in which defendants are alleged to have participated. *Wrenn*, 561 F. Supp. at 1221. *Cf. Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226, 1234-35 (7th Cir. 1980) (In reviewing complaint under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which is modeled after and enforced in the

same manner as 42 U.S.C. § 2000(d), court should not define program, and therefore identify its intended beneficiaries, in a "very narrow fashion."); *Byers v. Rockford Mass Transit Dist.*, 635 F. Supp. 1387, 1390 (N.D. Ill. 1986) ("As long as some federal funding is alleged [in § 504 actions] . . . , the program specificity issue is more properly the subject of a summary judgment motion.").

2. *Sufficiency of Dr. Fobbs' Intended Beneficiary Allegation*

[8] Dr. Fobbs appears to set forth three theories for recovery under § 2000(d). Dr. Fobbs' first theory is that St. Agnes receives federal funds, and that it has impermissibly discriminated against him based on his race. As discussed above, this states a Title VI claim under *Wrenn*.

[9] Dr. Fobbs' second theory is that he is an intended beneficiary of funding designed to improve health care for his patients. He argues that because defendants discriminated against his patients on the basis of their race by discouraging people of color from obtaining medical services at St. Agnes, defendants impermissibly decreased Dr. Fobbs' ability to exercise his profession at St. Agnes. Under this theory, Dr. Fobbs is essentially only an *incidental* beneficiary of programs designed to benefit his patients, and is trying to manipulate his status as an incidental beneficiary into that of a primary or intended beneficiary. Thus, Dr. Fobbs fails to state a claim under this theory.

Finally, Dr. Fobbs alleges that he is asserting his patients' and his potential patients' rights on their behalf. Like physician Doe in *St. Joseph's Hospital*, Dr. Fobbs seeks to represent his patients on the grounds that "discrimination against doctors imports discrimination against their patients (presumably the primary beneficiaries here)." 788 F.2d at 421. Dr. Fobbs alleges that his patients are intended beneficiaries of St. Agnes' federally funded programs, and that the hospital

encourages doctors who do not take Medi-Cal or other uninsured patients to obtain and maintain staff privileges, while it discourages doctors who would admit Medi-Cal or uninsured patients into St. Agnes from obtaining and maintaining medical staff privileges. He alleges that a large percentage of these Medi-Cal and uninsured patients are minorities, and thus, St. Agnes' policy:

> has the impact of restricting the amount of minority patients who utilize [St. Agnes]. . . . It is alleged that Plaintiff Dr. FOBBS' patients and potential patients, approximately 60% of whom are members of a minority race will not be able to find a physician willing to admit them to [St. Agnes] because of the policies and practices complained of herein.

In *St. Joseph's Hospital*, the Seventh Circuit held that physician Doe did not establish third party standing to assert the rights of her patients, even where Doe's complaint invoked "the doctor/patient relationship and the obstacle to the patient raising their [sic] own rights (including their lack of resources and the uncertainty as to whether and when they might need hospitalization)." 788 F.2d at 421, n.18.

Dr. Fobbs seeks to distinguish *St. Joseph's Hospital* on the ground that unlike Doe, Dr. Fobbs alleged that other physicians at St. Agnes could not admit his patients to St. Agnes, and that therefore, his patients cannot gain access to St. Agnes without Dr. Fobbs, or at the least, his patients are burdened in that they "will have more difficulty in securing admission to the hospital than will other patients."

We reject this theory for two reasons. First, Dr. Fobbs conceded to the district court that other doctors at St. Agnes may admit his patients and that St. Agnes does not totally exclude minority patients. Second, Dr. Fobbs has not explained why *he*, rather than his patients, should receive money damages for

injury inflicted on his patients.[1] *See United States General, Inc. v. City of Joliet*, 432 F. Supp. 346, 351 (N.D. Ill. 1977) ("[I]f [low income housing developer] plaintiff prevailed on the merits, it would obtain damages for itself and the minority group families would receive no benefit . . . . [P]laintiff lacks standing to bring this action solely as a result of the indirect relationship between it and the minority group families.").

[10] We hold that Dr. Fobbs in his Title VI claim has sufficiently alleged personal racial discrimination, and the dismissal of the district court on that issue is reversed. However, his allegations of third party standing and discrimination against his patients are not valid, and the holding of the district court on those issues is affirmed.

D. *42 U.S.C. § 1985(3) Claim*

42 U.S.C. § 1985(3) provides a cause of action for damages where "two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . ."

---

[1] The district court specifically questioned Dr. Fobbs' attorney on this point:

> THE COURT: "How is [Dr. Fobbs] entitled to collect anything for his patients being discriminated against? Because he loses money?"
>
> MR. WEISBERG: "Well, certainly there is the allegation that he has lost substantial amounts of money as a result of having lost his privileges."
>
> THE COURT: "No, now you are changing the subject on me again. You said he wants money because he didn't collect money because his patients couldn't go to that hospital."
>
> MR. WEISBERG: "That's correct."

Reporter's Transcript May 7, 1990, p.11.

The primary issue of this claim is whether a heightened pleading standard for civil rights cases as set forth in *Frazier v. Southeastern Pa. Transp. Auth.*, 785 F.2d 65 (3d Cir. 1986), is required. However, the Supreme Court has recently rejected heightened pleading standards under the Federal Rules of Civil Procedure for almost all claims except fraud and mistake. *Leatherman v. Tarrant County Narcotics Intelligence and Coord. Unit*, 113 S. Ct. 1160, 1163 (1993).[2]

The Court specifically noted that the imposition of any heightened pleading requirement must be made by amendment to Federal Rules 8 and 9, rather than by judicial interpretation. It stated that, "[i]n the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Leatherman*, 113 S. Ct. at 1163. Thus, the *Leatherman* standard applies to § 1985 claims.

A sufficiently pleaded complaint "will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Plaintiff must give " '[s]ome facts as to when, how, to whom, and with what results such discrimination has

[2]In *Leatherman*, the Court was concerned solely with the issue of whether the federal courts may apply a heightened pleading standard to § 1983 claims against municipalities. Nonetheless, the Court's analysis encompasses almost all claims subject to Federal Rules of Civil Procedure 8 and 9, as other federal courts have recognized. *See Mid America Title Co. v. Kirk*, 991 F.2d 417, 421 (7th Cir.) (Copyright Act, 17 U.S.C. § 101, *et seq.*), *cert. denied*, 114 S. Ct. 346 (1993); *Warwick Administrative Group v. Avon Products, Inc.*, 820 F. Supp. 116, 120 (S.D.N.Y. 1993) (CERCLA, 42 U.S.C. § 9607(a)); *Neal v. Honeywell, Inc.*, 826 F. Supp. 266, 268 (N.D. Ill. 1993) (False Claims Act, 32 U.S.C. § 3729, *et seq.*). *Cf. Branch v. Tunnell*, 14 F.3d 449 (9th Cir.) (justifying application of heightened pleading standard on the ground that the Supreme Court expressly declined to decide whether its "qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." *Id.* at 456 (quoting *Leatherman*, 113 S. Ct. at 1162)), *petition for cert. filed*, 62 U.S.L.W. 3575 (1994).

been applied.' " *Grohal v. Stauffer Chemical Co.*, 385 F. Supp. 1267, 1268 (N.D. Cal. 1974) (quoting *Ogletree v. McNamara*, 449 F.2d 93, 98 (6th Cir. 1971)).

[11] In this case, the district court found that while Dr. Fobbs alleged the requisite elements for conspiracy under § 1985(3), these allegations were too broad and conclusory. *See Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711 (9th Cir.), *cert. denied*, 454 U.S. 967 (1981). Dr. Fobbs has alleged that (1) defendants entered into a conspiracy; (2) the purpose was to deprive himself and his minority patients of equal protection of the laws based on his race and the races of his patients; and (3) these acts deprived plaintiff of his rights and privileges as an American citizen.

[12] In support of his conspiracy allegation, Dr. Fobbs has also pled that overt acts were done in furtherance of the conspiracy, including, *inter alia*: (1) attempts to limit or eliminate Dr. Fobbs' surgical privileges at defendant Medical Center; (2) the September 30, 1988 suspension of Dr. Fobbs' medical privileges; (3) attempts to cause the California State Board of Medical Quality Assurance ("CSBMQA") to take disciplinary action against Dr. Fobbs; (4) damage to Dr. Fobbs' practice and professional relationships by causing the CSBMQA to report the restrictions on Dr. Fobbs' privileges to numerous medical facilities and medical insurance carriers and the Texas State Board of Medical Examiners; (5) successful attempts to cause defendant St. Agnes Medical Center to take disciplinary action against Dr. Fobbs by making false accusations against him; (6) defamation of Dr. Fobbs' skill and qualifications as a physician and surgeon; and (7) interference with the granting and retention of full obstetric and gynecological and laser surgical privileges at St. Agnes, Fresno Community Hospital, Clovis Community Hospital and the Fresno Surgery Center.

The district court dismissed the claim because "the existence of a conspiracy and the roles of the various defendants

in such a conspiracy remains obscure. It is unclear whether plaintiff claims he was discriminated against because of his race, that he was discriminated because of his patients' races, or that his patients were discriminated against because of their race." The district court appears to believe that plaintiff may legitimately allege only one theory of conspiracy. In evaluating a complaint, however, "any doubts should be construed in favor of the pleader." *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980). Construing the district court's doubts in Dr. Fobbs' favor, it seems that he is alleging all three theories that the court has identified; furthermore, Dr. Fobbs appears to also allege that his patients were discriminated against because of *his* race.

[13] These theories of discrimination, coupled with Dr. Fobbs' catalog of defendants' allegedly discriminatorily motivated overt acts give defendants fair notice as to the specific acts which Dr. Fobbs contends demonstrate a conspiracy to interfere with his right and privilege to practice medicine based on his race and on the race of his patients.

Finally, defendants contend that (1) plaintiff is claiming discriminatory impact, rather than animus, (2) plaintiff has failed to identify the rights, privileges and immunities which he has been denied, (3) plaintiff has failed to demonstrate how he has been discriminated against because of his patients' races, and (4) plaintiff does not have standing to assert his patients' claims of race discrimination. The first three of these contentions lack merit.

First, Dr. Fobbs has alleged that defendants targeted him because of his race, not that defendants' actions had an adverse impact on him as a black man. *See Johnson v. Greater Southeast Community Hosp. Corp.*, 951 F.2d 1268 (D.C. Cir. 1991).

Second, Dr. Fobbs has identified the practice of medicine as a privilege under Article IV, § 2 of the Constitution, *see*

Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 281 (1985), and his right to be free from improper racial discrimination under the Fourteenth Amendment of the Constitution.

Third, Dr. Fobbs has presented a colorable claim that his privileges were restricted because he treated primarily patients of color.

[14] Defendants are correct, however, with respect to Dr. Fobbs' standing to sue under § 1985 on the claim that defendants conspired to racially discriminate against his patients. Where a physician seeks declaratory or injunctive relief, he has standing to bring action on behalf of patients who are members of a protected class for conspiracy to deprive the patients of equal protection of laws and equal privileges and immunities of national citizenship. *See Cousins v. Terry*, 721 F. Supp. 426, 428-29 (N.D.N.Y. 1989). *Cf. Haskell v. Washington Township*, 864 F.2d 1266, 1274-76 (6th Cir. 1988) (physician has standing to bring suit for equitable relief on behalf of his patients based on harm to his patients and has personal standing to bring suit for monetary relief based on harm to his financial interests). As discussed above with regard to his Title VI claim, Dr. Fobbs does not have standing to bring a suit on behalf of his patients, where he seeks money damages. *See City of Joliet*, 432 F. Supp. at 351.

[15] Because Dr. Fobbs has stated a colorable claim of conspiracy, we reverse the district court's dismissal of his § 1985(3) claim. However, the dismissal of those aspects of the claim alleging racial discrimination against Dr. Fobbs' patients is affirmed.

II. *CONCLUSION*

The district court's grants of summary judgment on Dr. Fobbs' Sherman Antitrust Act and § 1981 claims are AFFIRMED.

The district court's dismissals of Dr. Fobbs' Title VI and § 1985(3) claims are REVERSED as to those parts which allege racial discrimination solely against Dr. Fobbs and AFFIRMED with respect to the allegations of discrimination against his patients.

No. 94-259

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

LAWRENCE F. BROWN, M.D.,
Petitioner,
vs.
NATIONAL MEDICAL ENTERPRISES, INC.,
NME HOSPITALS, INC. dba DOCTORS HOSPITAL OF
MONTCLAIR and KEVIN JENKINS, D.O.,
Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal Fourth Appellate District, Division Two

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Do state court civil discovery procedures and rules of court confer jurisdiction in this Court in this matter;

2. Where Petitioner fails to raise a federal question in the state court, may he do so for the first time before this Court;

3. Does the expiration and non-renewal of an exclusive agreement with a physician to operate a service provided by a hospital violate due process or equal protection provisions of the Fourteenth Amendment of the United States Constitution.

PARTIES

Petitioner

Lawrence F. Brown, M.D., individual.

Respondents

NATIONAL MEDICAL ENTERPRISES, INC., (parent corporation)

NME HOSPITALS, INC. dba DOCTORS HOSPITAL OF MONTCLAIR,

KEVIN JENKINS, D.O., individual.

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Respondents.

On Petition for Writ of Certiorari
to the California Court of Appeal
Fourth Appellate District, Division Two

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondents, NATIONAL MEDICAL ENTERPRISES, INC., NME HOSPITALS, INC. dba DOCTORS HOSPITAL OF MONTCLAIR and KEVIN JENKINS, D.O. (hereinafter referred to as "Respondents"), respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, Lawrence F. Brown, M.D. (hereinafter referred to as "Petitioner") for the reasons and on the grounds set forth herein.

OPINION BELOW

The opinion and orders below are set forth in the Petition for Writ of Certiorari and are reproduced in the appendix thereto.

JURISDICTION

Neither 28 U.S.C.A. Section 1257(a), nor any other federal statute or law, confers jurisdiction in this case on this honorable Court.

As will be discussed in full herein, no jurisdiction exists because a federal question was not presented or passed on in the state courts. *Hill v. California,* 401 U.S. 797 (1971). In fact, the California courts have complete jurisdiction over the parties and subject matter of the case. *Randall v. Howard,* 67 U.S. 585 (1862).

Furthermore, there was no "state action" by the California Courts in deciding the case based upon long-established state law concerning private contractual relationships. *Webb v. Webb,* 451 U.S. 493 (1981); *Shelley v. Kraemer,* 334 U.S. 1 (1948).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

As will be discussed below, no Constitutional provisions, federal statutes or other federal laws are involved in this matter.

STATEMENT OF THE CASE

Statement of Facts

The pertinent facts in this action are set forth in detail in the Opinion of the California Court of Appeal (reproduced

at Appendix A in the Petition for a Writ of Certiorari[1]), and are adopted by Respondents and incorporated by reference herein.

Briefly, however, the instant action arises from the *expiration* and *non-renewal* of a *two-year* agreement between Petitioner, LAWRENCE F. BROWN, M.D., and Respondent NME HOSPITALS, INC., dba DOCTORS HOSPITAL OF MONTCLAIR (hereinafter referred to as "the Hospital"). On December 1, 1985, Petitioner entered into an agreement with the Hospital under which he was to serve as Director of Radiology and provide radiology services to patients at the Hospital. This Agreement was for a stated term of *two years.*

Petitioner had served as director of the Radiology Department since 1977. During Petitioner's directorship of the Radiology Department from 1977 through 1987, his services were provided on an exclusive basis pursuant to several written agreements, all following almost identical form.

Summary of Arguments

1. **Petitioner Has Failed To Invoke The Jurisdiction Of This Court By Failing To Raise Any Purported Federal Question In The State Court**

It is apparent in the first instance that Petitioner has failed to invoke the jurisdiction of this Court because he did not raise a federal question in the state courts. *Hill v. California*, 401 U.S. 797 (1971).

Since the state court had jurisdiction over the parties and subject matter of this case and it was decided based on long-accepted legal precedent followed by the courts of Califor-

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[1]Hereinafter, the Opinion of the California Court of Appeal will be referred to as "Opinion" and the instant Petition for a Writ of Certiorari will be referred to as "Petition."

nia, the decision should not be disturbed. (*See Randall v. Howard*, 67 U.S. 585 (1862).)

Furthermore, the state courts performed their separate and proper functions in denying Petitioner's "discovery" motion, in setting a time limit for appellate oral argument and in not incorporating Petitioner's proffer of corrections into the Court of Appeal's tentative opinion. *Webb v. Webb*, 451 U.S. 493 (1981).

2. The Decision Below Was Correct

Apart from the lack of jurisdiction in this case, no reason is apparent for review of the decision below. The decision was based upon long-established California law that permits hospitals such as Respondent Hospital to enter into exclusive agreements for the operation of certain hospital services or departments, including the Department of Radiology for the benefit of patient health and safety and the efficient operation of such departments.

ARGUMENTS AND AUTHORITIES: REASONS FOR DENYING THE WRIT

Respondents oppose the Petition for a Writ of Certiorari on the following grounds:

I.

THIS CASE PRESENTS NO ISSUE APPROPRIATE FOR THIS COURT'S EXERCISE OF ITS DISCRETIONARY JURISDICTION

A. No Federal Question Was Raised Below

In order to invoke the jurisdiction of this Court in this action, a federal question must have been raised in the state court. *Hill v. California*, 401 U.S. 797 (1971). As a review of the Petition reveals, no constitutional issues or federal question was raised in the trial court, before the California

Court of Appeal or before the California Supreme Court. That Petitioner now at this late stage raises a Fourteenth Amendment claim and also cites the Health Care Quality Improvement Act of 1986 (at 42 U.S.C.A. Sections 11111-11152), is of no merit or consequence.

In *Hill*, the petitioner argued that the admission into evidence of two pages of his diary which contained what could be interpreted as a confession of a robbery violated the Fifth Amendment of the U.S. Constitution. However, the Constitutional issue was never raised at the criminal trial, nor was it raised, briefed or argued in the California appellate courts.

In affirming the judgment of the California Supreme Court, the U.S. Supreme Court stated:

> "In *Cardinale v. Louisiana*, 394 U.S. 437 (1969) certiorari was granted to consider the constitutionality of a Louisiana statute, but at oral argument it developed that the federal question had never been raised, preserved, or passed upon in the state courts. Relying on a long line of cases, we dismissed for want of jurisdiction. 394 U.S. at 439." *Id.*

In *Webb v. Webb*, 451 U.S. 493 (1981), this Court was faced with a similar assertion by a petitioner of a Constitutional issue where none had been raised below. In *Webb*, just as in the instant matter, the claimed basis of jurisdiction was 28 U.S.C. Section 1257. The *Webb* court stated:

> "As applied to the circumstances of this case, that statute requires that in a state court, petitioner have 'specially set up or claimed under the Constitution . . . of . . . the United States' that right which he now seeks to have this Court enforce. 28 U.S.C. Section 1257(3) [currently, 28 U.S.C. Section 1257(a)]. Similarly our Rule 21.1(h) [currently, Rule 14.1(h)] requires a petitioner to 'specify the stage in the proceedings, both

> in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court.'
>
> . . .
>
> "We note first that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon. Nor is any federal issue mentioned by the dissenting opinion in that court. This Court has frequently stated that when '*the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, . . .*' (Citations omitted.)" *Id.* at 495-496. (Emphasis added.)

B. There Was No "State Action" By The California Courts

Also without merit are Petitioner's claims that the trial court violated his due process and equal protection rights by denying a motion to compel discovery and that the Court of Appeal did the same by not accepting Petitioner's proffer of corrections to the tentative opinion and by the court's adherence to a fifteen-minute limit on oral argument. By way of these claims, Petitioner asserts some sort of "state action" by the state courts.

With regard to Petitioner's "state action" argument, the *Webb* court is also instructive, as follows:

> "In the first place, although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes re-

> sponding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements. As the Court has elsewhere observed, this principle of comity requires 'a proper respect *for state functions*, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways.' *Younger v. Harris*, 401 U.S. 37, 44 (1971)." *Id.* at 499-500. (Emphasis added.)

Thus, that the trial court performed its separate function with regard to a motion to compel discovery and the Court of Appeal adhered to its own rules of oral argument and "corrections" to its tentative opinion, does not amount to "state action."

C. The Cases Cited In The Petition and in the Supplemental Brief To The Petition Are Wholly Unrelated To The Facts And Issues In This Case And Do Not Support The Petition

The cases relied on by Petitioner as conferring jurisdiction upon this court, *Shelley v. Kraemer*, 334 U.S. 1 (1948) and *Thompson v. Louisville*, 362 U.S. 199 (1960), are substantively and procedurally unrelated by any stretch of the imagination to the case at hand.

First, in contrast to the facts in *Shelley*, this case does not involve the active enforcement by the state courts of blatantly racially restrictive covenants relating to real property. Second, this case does not involve the issue of insufficiency of evidence in a criminal trial, as was the subject matter of *Thompson*.

Instead, the within case involved a private contractual relationship between a hospital and a doctor with a stated term of two years. The two-year agreement between the parties simply expired pursuant to its terms and was not renewed by the Hospital. There is simply no issue herein which would support invocation of the due process and equal protection provisions of the Fourteenth Amendment of the United States Constitution even if such had been raised before the state court.

As stated in *Shelley*, the distinction between the United States Supreme Court cases which found state action by the state courts and those cases which did not, are those which involved "the active intervention of the state courts, supported by the full panoply of state power," and those "in which the States have made available to such individuals the full corrosive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell." *Shelley*, 334 U.S. at 19. Plainly, the instant action is not such a case.

As noted above, in both the *Shelley* and *Thompson* cases, and in fact all of the cases cited in the Petition, a *federal question was raised by Petitioner in the lower courts*, something which is completely lacking here.

The requirement that a federal question be raised below in order to invoke the jurisdiction of this Court is based upon sound reasoning. As stated by this Court in *Webb*, *supra*:

> "There are also very practical reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do

> not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth .... Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter." *Webb*, 451 U.S. at 500-501.

In Petitioner's Supplemental Brief to the Petition, he cites *Fobbs v. Holy Cross Health System Corp.*, 29 F.3d. 1439 (1994), as having jurisdictional and substantive bearing on the instant case. Once again, Petitioner relies on a case which is wholly inapplicable to the instant action.

In *Fobbs*, the petitioning doctor had his staff privileges summarily suspended by the hospital. In stark contrast, Petitioner's staff privileges were *not* terminated or suspended. Here, Petitioner was under an exclusive contract to serve as Director of Radiology at Respondent Hospital. (*See* C.T. at Vol. IV, 793-829.) Such agreement was for a stated term of *two years*. (C.T. at Vol. IV, 803.) The agreement between Petitioner and Respondent Hospital set forth that Petitioner was an independent contractor, expressly identified the specific term of the agreement, and provided that either party could terminate the agreement without cause on ninety days notice. (C.T. at Vol. IV, 803, ¶ V1B.) Thus, the contract expired pursuant to its own terms. In fact, Petitioner conceded in evidence submitted to the trial court that his privileges as a member of the Hospital's medical staff *were not* affected by the non-renewal of the agreement. (C.T. at Vol. IV, 830-31.)

Another compelling difference between the *Fobbs* case and the within action is that the *Fobbs* petitioner asserted several federal claims in his action and brought the action in federal court. Petitioner herein, however, asserted no federal claims *at all*, but instead, based his claims on California law.

Because Petitioner never raised a federal claim in the state courts, as reflected by the Opinion below, there can be "no state action" herein, and the Petition should be denied for want of jurisdiction.

II.

THE DECISION BELOW IS WELL REASONED AND INVOLVES NO CONFLICT OF OPINION OR OTHER BASIS FOR REVIEW BY THIS COURT

Aside from the lack of jurisdiction, there is no reason for review of the decision below. The decision of the California Court of Appeal was based upon long-established legal authority which allows hospitals, such as Respondent Hospital, to enter into exclusive agreements for the operation of certain hospital services or departments, including the Department of Radiology. (*Centeno v. Roseville Community Hospital*, 107 Cal. App. 3d. 62 (1979); *Lewin v. St. Joseph Hospital of Orange*, 82 Cal. App. 3d. 368 (1978).) The decision of a hospital to enter into an exclusive agreement has been found by each California Court that has considered this issue to be rationally based and have inherent advantages to patient health, safety and convenience, as well as administrative efficiency. (See also, *Mateo — Woodburn v. Fresno Community Hospital & Medical Center*, 221 Cal. App. 3d. 1169 (1990); *Redding v. St. Francis Medical Center*, 208 Cal. App. 3d. 98 (1989); *Blank v. Palo Alto — Stanford Hospital Center*, 234 Cal. App. 2d. 377 (1965).)

Furthermore, this is not a case where a federal question was decided in conflicting ways or where, as Petitioner

argues, "an entire tangle of conflicts appears among the courts of the states." Neither, as the Petitioner argues, is the unpublished opinion precedential.

In emphasizing that the facts of this case do not support Petitioner's arguments, the Court of Appeal stated:

> "Regardless of the spin which plaintiff has attempted to place on the facts, he was not 'terminated'; *his contract expired according to its terms and was not renewed.* In these circumstances, to declare the existence of a duty, fiduciary or otherwise, or a covenant of good faith and fair dealing, would engraft upon the contract, *which had no renewal provision*, a requirement that defendants could not refuse to renew the contract except for good cause. This we decline to do." (Opinion, at Appendix A to Petition, p. 18; emphasis in original.)

Moreover, as noted by the court in its Opinion, the Hospital did not grant Petitioner a "right to make a living" and/or a "right" to have unlimited use of its equipment and facilities, and the fact remains that Petitioner can still exercise his medical staff membership and clinical privileges at Respondent Hospital.

Finally, as to Petitioner's argument that the trial court violated his due process and equal protection rights by denying a motion for discovery, the Court of Appeal was never faced with such an argument by Petitioner; rather, Petitioner's briefs to the California Court of Appeal contained no legal authority whatsoever with regard to that issue. As noted by the Court of Appeal in its Opinion:

> "Plaintiff's Opening Brief includes an argument entitled 'THE NEED FOR DISCOVERY' this argument is apparently addressed to the trial court's denial of plaintiff's motion for a continuance to unable him to conduct further discovery. (Code Civ. Proc., Section 437 subd. (h).) However, the argument consists

only of a three-page exposition of the discovery which plaintiff contends he needs to conduct, and does not include any legal authority whatsoever. Accordingly, we shall treat the issue as waived and shall not consider it. (*Troensgaard v. Silvercrest Industries, Inc.* (1985) 175 Cal. App. 3d. 218, 228.)" (Opinion, at Appendix A to Petition, p. 25, fn.2.)

III.

CONCLUSION AND PRAYER

Respondents pray that this Court deny the instant Petition for Petitioner's failure to raise any jurisdictional basis for review and because the decision below was properly decided based upon well-established state law and case authority.

Dated: September 7, 1994

DUMMIT, FABER & BRIEGLEB

By: CHRISTOPHER J. FABER
SUSAN J. VEIS
Attorneys for National Medical Enterprises, Inc., NME Hospitals, Inc. dba Doctors Hospital of Montclair and Kevin Jenkins, D.O.

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No. 94-259

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

LAWRENCE F. BROWN, M.D.,
Petitioner,
vs.
NATIONAL MEDICAL ENTERPRISES,
NME HOSPITALS, INC. and KEVIN JENKINS, D.O.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION TWO

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

SUMMARY OF ARGUMENT

State action violating the Fourteenth Amendment consisted of the California Court of Appeal's introduction of fictions imposing a comprehensive set of forfeitures upon Petitioner. Those fictions gave the false impression of justification for the trial court's judgment and the Court of Appeal's ruling affirming it. Those judicially imported fictions consisted of misrepresentations that no termination of clinical privileges had occurred, and that no right to a hearing existed.

The Court of Appeal's ruling in approving the trial court's grant of summary judgment, also sealed the fate of discovery motions including petitioner's Motion to Compel which had been pending in the trial court. That motion emphasized discovery on the prime issue of whether the ouster of petitioner was racially imposed.

As soon as the Court of Appeal Opinion and Judgment issued, applying those fictions, petitioner presented the federal questions raised thereby — prominently concerning violation of federal constitutional law — to the California Supreme Court. Petitioner also invoked federal statutory law in his Petition for Review to the Supreme Court, specifically the Health Care Quality Improvement Act, 42 U.S.C. § 11101 *et seq.*, presented in Appendix D of the Petition for Writ of Certiorari.

Specifically, Petitioner sought relief in the California Supreme Court on the ground that the state actions on the judicial side violated the Fourteenth Amendment's right to due process of law and right to equal protection of the laws. Further, Petitioner invoked the ground that the state acts violated the peer review public policy requirement of the aforesaid federal health statute. (Petition for Review, Appendix A9 herein.)

Petitioner here shows that this Court has jurisdiction, that violations of federal constitutional and statutory law occurred, and that the federal and especially Fourteenth Amendment questions are raised and supported.

I.

RESPONDENTS' DENIALS NOTWITHSTANDING: PETITIONER MADE AMPLE AND, INDEED, EXTENSIVE PRESENTATIONS TO THE COURTS BELOW, OF THE FEDERAL CONSTITUTIONAL GROUNDS FOR THIS COURT'S JURISDICTION AND OF THE FEDERAL QUESTION.

Due process is a federal right under the Fourteenth Amendment. So is equal protection of the laws. In the

course of the summary judgment motion in the trial court, Petitioner showed that the Respondents had assured him in writing that in the event that the quality of services of this physician were challenged, he would be entitled to proceed under due process protection. (See Appendix C1-3 herein, CT 957-959; CT 995.) Petitioner "identified as one of the disputed issues whether the property and liberty right that is owed by the hospital is protected where the *hospital ousts him from the department so that he can no longer exercise those privileges.*" (Emphasis added.) The corporate hospital Respondents took shelter under its threadbare and fictitious excuse that it did not physically strike his name from the clinical privileges record!

Petitioner denied defendants' assertion that since the contract with plaintiff expired of its own terms, he cannot assert any cause of action. (Appendix D herein.) He pointed out that his rights have no connection to any contract or its renewal or nonrenewal. He showed (Appendix D1-2, CT 1367, 1370) that the defendants admit that not only do the bylaws protect the plaintiff, but so also does the protective standard of due process, which the bylaws embrace. [1] (Appendix D2)

And, in its letter of December 15, 1978 to petitioner, "NME admits [that the] privileges are inalienable and therefore require adherence to . . . *due process* for any stripping of clinical privileges from plaintiff" (emphasis added). (Appendix D2, CT 1371) "The defendants

---

[1] In the 1980 agreement with Petitioner, Respondents admit that they were held to a due process standard. CT 945 at 950: "In the event any dispute shall arise concerning the quality of professional services being rendered hereunder [by Petitioner] the parties agree . . . that no such dispute shall be resolved without regard to the due process provisions of the bylaws of the medical staff and the governing board."

knew they were breaking the law . . . and that "nothing in the 'contract' permitted them to bar plaintiff from Radiology . . . ." They knew that the "privileges . . . could not be removed . . ." except by procedures (of calling a due process and bylaw-bases hearing) which they admitted they had not done and had no intention of doing. *Id.* Letter to Petitioner dated December 15, 1987, Exhibit 25. Also, the admissions ". . . that the privilege could not be removed except by full hearing and due process procedures as prescribed, are found . . . in the Leyhe (NME vice-president's) testimony. . . ." And the contrary ". . . assertion by the defendants is worse than hollow." (Appendix D2-3, CT 1381; Appendix F1, CT 1428 — quoting from petitioner's Separate Statement opposing the Summary Judgment motion.)

Petitioner's further laying of the foundation for this Court's writ — within petitioner's response to the Motion for Summary Judgment — invoked the federal constitutional law principle that "The summary adjudication /judgment procedure, inasmuch as it denies the right of the adverse party to a trial, is drastic and should be used with great caution." *Logan* In addition, in contesting the Motion for Summary Judgment he argued that the *United States Constitution, Amendment Fourteenth, itself, becomes part of the caution*, by its provision: ". . . nor shall any State deprive any person of . . . liberty or property, without due process of law . . . including the right to a trial — a right reaching all the way back to article 39 of Magna Carta." (Emphasis added.) Citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). (Appendix D3, CT 1399)

Thus petitioner raised the Fourteenth Amendment Constitutional provisions and federal statute. The Court of Appeal received the Clerk's Transcript record

showing those petitioner's federal law responses to the summary judgment motion.

Then, after the Court of Appeal wrought its fiction-based Opinion that there had been no termination of petitioner's privileges and that petitioner had no right to a hearing, the petitioner responded at the California Supreme Court level — by petitioning that court for review showing applicable Federal Constitutional, statutory and case law. Petitioner explicitly raised his federal rights and the violations thereof as follows:

One: In the Petition for Review to the Supreme Court of California, petitioner set forth that "This [California Supreme] Court has established . . . [citing cases] that physician's hospital privileges . . . are fundamental vested rights protected by . . . the *due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution* [citing *Ascherman I, Anton, Westlake, Miller, Ascherman II, Applebaum, Bergeron,* and *Sams v. Ohio Valley Hospital Assn* (4th Cir. 1969) 413 F.2d 826, and *Marin v. Citizens Memorial Hospital,* 700 F.Supp. 354] that hospitals cannot, therefore, terminate those privileges without a fair quasi-judicial hearing . . ." (Appendix A1-2)

"Thus, under that body of doctrine, Petitioner had, in common with other physicians, *a property and liberty right to exercise his privileges that was vested, fundamental, and inalienable except by due process* . . . hearing . . ." (Emphasis added.) (Appendix A2)

Two: As shown in Appendix A, pages 7-8, petitioner in his Petition for Review to the California Supreme Court argued as follows: "[T]he Court of Appeal has, through the extension of . . . fictional reasoning of such cases . . . enforced . . . forfeiture of Petitioner's vested property right in his staff privileges *without due process of law, in violation of the Fourteenth Amendment to the*

United States Constitution." *viz, Shelley v. Kraemer* (1948) 334 U.S. 1. (Emphasis added.)

As was the case in *Shelley*, the instant Petitioner, a black physician, alleged and asserted that Respondents acted on racial motivation to deprive him of his property rights, whereas the Court of Appeal, by and through its fictional findings that Respondents did not terminate Petitioner's staff privileges and that Petitioner was not entitled to a hearing, has *thereby violated federal Due Process and Equal Protection rights under the Fourteenth Amendment* — certainly no less than the state court in *Shelley* violated the Fourteenth Amendment and laid the groundwork for the grant of the writ of certiorari to that ousted black victim. The California Court of Appeal, by its ruling and opinion has validated that deprivation, that violation. (Appendix A7)

Three: Still further, petitioner invoked the federal Health Act, 42 U.S.C.A. § 11101 *et seq.* — set forth in Appendix D of the Petition for Writ of Certiorari. Petitioner advised that said act mandated the California Business and Professions Code § 809, that the public policy for all states including California shall ensure fair peer review for physicians because it is " 'essential to preserving the highest standards of medical care,' while the lack of it 'results in harm to both patients and healing arts practitioners by limiting access to care.' " (Appendix A9)

Four: Beyond the above, and responding to a statement in Respondents' Brief in Opposition, Petitioner stated to the California Supreme Court in his Reply to Answer to Petition for Review, that "Petitioner *does* have a property right in the diagnostic equipment at Respondent hospital, because the exercise of his staff privileges at the hospital necessarily entails the use of that diagnostic equipment, and he has *a vested property*

right in those privileges . . ." (Emphasis added.) (Appendix B3 herein.)

II.

THE RESPONDENTS' DENIALS NOTWITHSTANDING, THE EVIDENCE (AND LAW) IS CONCLUSIVE THAT RESPONDENTS TERMINATED PETITIONER'S VESTED CLINICAL PRIVILEGES.

The Court of Appeal's denial that Respondents terminated Petitioner, is entirely fictitious. That court's denial crashes head-on against Petitioner's evidence, including Respondents' several compelling admissions that they did both and explicitly also in fact terminate Petitioner's exercise of his privileges, e.g., by excluding him from the only place where he could exercise them, the Department of Radiology! The Petitioner's Petition for Review (Appendix A6) states that "Even respondents admitted to appellant [in the Jenkins deposition, Vol. 1, p. 925] that he could not use the X-ray equipment and charge for it, and that he could not do diagnostic studies." Respondents made clear that the exclusion was entire, e.g., when they told Vineyard Medical Group that "Petitioner could provide neither 'outpatient nor inpatient radiological services' at Respondent's Hospital." (Appendix A6, CT 1117) Thus, in his Reply to Answer to Petition for Review, petitioner advised the California Supreme Court further that "Respondent's claim that Petitioner 'can still exercise' his privileges at Respondent hospital is patently false. . . ." (Appendix B5-6)

III.

NOTWITHSTANDING THE COURT OF APPEAL'S DENIAL: PETITIONER HAD BEFOREHAND SHOWN THAT COURT THAT RESPONDENTS ADMITTED THAT THEY TERMINATED PETITIONER'S CLINICAL PRIVILEGES AND THAT HE HAD THE RIGHT TO A HEARING. THEN, ON RECEIVING THE TENTATIVE OPINION TO THE CONTRARY, PETITIONER PROMPTLY PREPARED AND PROFFERED EXTENSIVE CORRECTIONS WHICH THE COURT REFUSED TO RECEIVE.

The falsity of the denial that Petitioner had a right to a hearing is shown further in Petitioner's statement in his Petition for Review to the California Supreme Court: "Ironically," stated Petitioner therein, "if the Court of Appeal had applied the requirements that such cases as *Centeno* and *Mateo-Woodburn* establish . . . as at one point the Appeals Court suggests that it does," Opn., pp 20-27, ". . . respondents' conduct could not have met even *that* more relaxed standard, for [those cases] make it clear that such action must not be targeted at a particular physician." (Emphasis added.) (Appendix A8)

IV.

REASONS FOR GRANT OF CERTIORARI

This Court should grant certiorari in order to establish authoritatively that the national public policy requires protection not only for the *form* of physician's hospital

privileges, but also for their *substance*: the right of a physician to *exercise* those privileges. This case offers a fine opportunity to fulfill the due process and equal protection requirements of the Constitution in the medical-hospital field and to stamp out egregious campaigns by hospitals to rid themselves of particular physicians or races without peer review through the use of exclusive contracting. (Appendix A3-5 herein) Grant of certiorari here is exceptionally meritorious also because the Court of Appeal extensively misreads the case law and also justifies the surreptitious destruction of the physician's privileges.

Shelley holds that a state court's denial of the fundamental rights of due process or of equal protection is of itself a state action violative of the Fourteenth Amendment. There was a time when no citation could have been supplied to this Court showing concretely that a *Shelley v. Kraemer* circumstance existed, to justify certiorari, *viz*, before the *Shelley* case happened. Yet the writ issued, and it stands to reason that here too, a unique complex of actions requires certiorari; namely, the combination of the above elements and, to emphasize,

a) the foregoing substitutions of fiction for fact,

b) the California court's opacity to the difference between exclusivity to occupy the Radiology Department and exclusivity to use it, leading to the mistaken conclusion that petitioner had a contract with exclusivity of use,

c) the Court of Appeal's mistaken view that the controlling California cases (Appendix A1-3 herein), show that petitioner did not have the right to a hearing for confiscation of his clinical privilege and that said cases did not merely aim at hospital membership, and

d) the ruling denying that Petitioner was terminated from his privileges by being terminated from their exercise.

The Petition for Writ of Certiorari should be granted.

DATED: October 26, 1994.

Respectfully submitted,

GERALD H. GOTTLIEB

Attorney for Petitioner
LAWRENCE F. BROWN, M.D.

APPENDIX A

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EXCERPTS FROM PETITION FOR REVIEW S039075

[Filed in the California Supreme Court April 4, 1994]

* * *

Appellant Lawrence F. Brown petitions this Honorable Court for review in the above-entitled matter after decision rendered by the Court of Appeal of the State of California, Fourth Appellate District, Division Two, on February 22, 1994. A copy of the opinion of the Court of Appeal is attached hereafter as Appendix A

* * *

NECESSITY FOR REVIEW

THIS COURT SHOULD GRANT REVIEW IN ORDER TO ENSURE THAT HOSPITALS CANNOT USE EXCLUSIVE CONTRACTS TO EVADE THEIR RESPONSIBILITY TO PROVIDE FAIR PEER REVIEW HEARINGS BEFORE DEPRIVING PHYSICIANS OF THE USE OF THEIR PRIVILEGES.

This Court has established through such decisions as *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, *Westlake Community Hospital v. Superior Court* (1975) 17 Cal.3d 465, and *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, and the Courts of Appeal have elaborated in such cases as *Ascherman v. San Franciso Medical Society* (1974) 39 Cal.App.3d 623, *Ascherman v. Saint Francis Memorial Hospital*

(1975) 45 Cal.App.3d 507, *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, and *Bergeron v. Desert Hospital Corp.* (1990) 221 Cal.App.3d 146, that physician's hospital privileges (as stated in hospital medical and corporate by-laws, including the by-laws of Respondent hospital) are fundamental vested rights protected by common law fair procedure and by the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution (*Ascherman v. San Franciso Medical Society, supra,* 39 Cal.App.3d 623, 644-45; *Sams v. Ohio Valley General Hospital Association* (4th Cir. 1969) 413 F.2d 826; and, *Marin v. Citizens Memorial Hospital* (S.D.Tex. 1988) 700 F.Supp. 354), and that hospitals cannot, therefore, terminate those privileges without a fair quasi-judicial hearing.

The continued vitality of that ramified and layered body of legal doctrine is now being put into question by the increasingly common practice of exclusive contracting, a practice by which physicians may be denied the ability to exercise their privileges simply because the hospital has used the ploy of giving someone else the exclusive right to use the facilities in their department.

Thus, under that body of doctrine, Petitioner had, in common with other physicians, a property and liberty right to exercise his privileges that was vested, fundamental, and inalienable except by due process or common law fairness hearing as made explicit by corporate and medical by-laws. A few Court of Appeal decisions can, however, be interpreted as having enunciated doctrine which tends — in clear violation of the jurisprudence of such decisions as *Anton v. San Antonio Community Hospital, supra,* 19 Cal.3d 802; *Miller v. Eisenhower Medical Center, supra,* 27 Cal.3d 614; and *Bergeron v. Desert Hospital Corp.* (1990) 221 Cal.App.3d 146 — to support these practices. They are

Centeno v. Roseville Community Hospital (1979) 107 Cal.App.3d 62; *Redding v. St. Francis Medical Center* (1989) 208 Cal.App.3d 98; and, *Mateo-Woodburn v. Fresno Community Hospital & Medical Center* (1990) 221 Cal.App.3d 1169.

Specifically, the Court of Appeal here has interpreted them to hold that no hearing is required to institute or continue the practice of exclusive contracting even though that practice may effectively deprive physicians of their privileges.

Respondent and the Court of Appeal here attempt to use these decisions to support rank fictions — construing them to hold that no hearing is necessary in such cases because (1) the physician does not actually *lose* his privileges, purportedly because the exclusive contract merely *excludes* him from places (such as operating rooms, emergency rooms and radiology departments, where they can exercise those privileges, and because (2) the decision is purportedly not personally directed against the excluded physician as is the case where privileges are revoked for unprofessional conduct or incompetence. *Mateo-Woodburn v. Fresno Community Hospital & Medical Center, supra,* 221 Cal.App.3d at 1187-88; *Redding v. St. Francis Medical Center, supra,* 208 Cal.App.3d 98 at 104.

But clearly, the exclusion of Petitioner from those places excludes Petitioner's exercise of those privileges, substantially or totally — an issue for trial. And the evidence is rife that the action was directed specifically against Petitioner, even though Respondents had no grounds for attacking his professional ability or conduct.

The fundamental problem with allowing hospitals to exploit exclusive contracts in this manner is, as the California Medical Association and California Association of Hospital and Health Systems have recognized, that they offer hospitals a ready means of circumventing

their obligations to respect physician's privileges as fundamental vested rights.

Thus, focusing on precisely the issue raised here, a 1992 joint statement the CMA and CAHHS found it necessary to unmask the fiction and warn that "exclusive contracts should not be used as a vehicle to preempt medical staff peer review" (Joint Statement on Economic Credentialing and Exclusive Contracting" by the California Medical Association and California Medical Association and California Association of Hospital and Health Systems, January, 1992, at page 3).

A 1991 report, "Exclusive Contracts and Economic Credentialing" of the Task Force on Exclusive Contracting and Economic Credentialing, California Medical Assn. at page 14, was even more explicit, noting that hospitals which have concerns about particular physicians may evasively "choose to close the department via an exclusive contract rather than go through any formal procedures, leaving those physicians without a contract also without privileges."

On the basis of these concerns, the CMA Model Medical By-Laws now protect the physicians — and give the right to a hearing to physicians "whose privileges may be adversely affected" by the hospital's decision to institute, continue, or transfer an exclusive contract.

The CMA's understanding that because a physician "without a contract" will be left (by the hospital which has allowed the contract to expire) "also without privileges" and that physicians must, therefore, have the right to a hearing before an exclusive contract adversely affects them, cuts through to the central fiction on which such decisions as *Centeno* and *Mateo-Woodburn* (as construed by the Court of Appeal) are purportedly based. The Court of Appeal cites *Mateo-Woodburn*, for example, which states that hospitals deprive no one of their

privilege though its exclusive contract "results in the exclusion of certain doctors from the operating rooms" 221 Cal.App.3d at 1185. On this dubious theory, adopted by the Court of Appeal here, the privileges are made to seem to exist though the physician has lost the means of exercising them.

The CMA report and CMA-CAHHS joint statement show that while such a triumph of fiction and form over substance and truth may satisfy that court's interest in maintaining formal consistency with abstract doctrine, it cannot satisfy the practical need of physicians for protection of their privileges, or of courts concerned with the real world objectives of good medicine.

The instant case shows the extent to which the concerns of the CMA and CAHHS are justified. Petitioner here is a radiologist who alleges that the hospital management deliberately set about to deny him the exercise of his privileges by awarding the exclusive right to use the radiology facilities to another physician (see Petition for Rehearing, p. 5). The case demonstrates the evils of indulging in fictions to permit the unjust forfeitures of vested clinical privileges.

The Court of Appeal, in upholding the grant of summary judgment against Petitioner, took the case (but only as the result of the error of assuming that Petitioner had an exclusive contract before the hospital ousted him, though he in fact had no exclusivity of use, [see PRH 2-3]) as involving the transfer of an exclusive contract (Opn., p. 28), a situation not previously considered in a published opinion.

The court, following *Centeno* and *Mateo-Woodburn*, held the action not to be a removal of privileges because Petitioner still *had* his privileges. Quoting *Centeno* to the effect that a physician still has his privileges when he is "only precluded from using *some* of the hospital's facilities" (107 Cal.App.3d at 75) and *Mateo-*

Woodburn's statement that "the exclusion of certain doctors from operating rooms" does not require a hearing (221 Cal.App.3d at 1185), the Court of Appeal concluded mistakenly that Petitioner's privileges remained intact despite his exclusion from "some of the hospital's facilities" (Opn., p. 30).

In fact, Petitioner was excluded from the only hospital facilities in which he, as a radiologist, could exercise his privileges. Even Respondents admitted to Appellant that he could not use the X-ray equipment and charge for it, and that he could not do diagnostic studies (Jenkins Depo., Vol. 1, p. 92). Respondents also made totally clear the fact that the exclusion was total when they told Vineyard Medical Group that Petitioner could provide neither "outpatient or inpatient radiological services" at Respondent hospital (CT 1117).

In principle, of course, whether a physician is totally or only partially excluded from the use of the facilities he needs to practice his specialization, the result is the same: he is deprived of the ability to exercise his vested rights to the extent of the exclusion. As the court said in *Applebaum v. Board of Directors, supra*, 104 Cal.App.3d 648 at 658, "we do not find that a partial exclusion of this magnitude [involving 40% of Applebaum's practice] merits any less procedural protection than revocation of full staff membership." Even if Petitioner's exclusion were partial (and it admittedly was total), therefore, it was admittedly so extensive that, in practical terms, it rendered whatever was left of Petitioner's privileges at Respondent hospital meaningless. The court below, purporting to build on *Centeno* and *Mateo-Woodburn* (though in fact, as will be shown below, disregarding the protections which even they establish) went so far as to decide that a transfer of an exclusive contract is not an occasion requiring a quasi-legislative decision, because it involves no change in

policy, only a change in personnel. As such, there was no need for the decision to be substantively rational, in accordance with public policy or procedurally fair (Opn., p. 28). In the court of appeals' view, the hospital was free in this situation to act untrammeled by any fiduciary or other duty to respect Petitioner's rights (Opn., p. 24).

This groundless holding extends and distorts even the fictional reasoning of the *Centeno* line of cases. The Court of Appeal interprets *Centeno* and the courts following it as not requiring "a judicial-type hearing" in quasi-legislative decision-making because in such proceedings, the "doctor's professional or ethical qualifications for staff privileges" are *not* in question. *Mateo-Woodburn v. Fresno Community Hospital & Medical Center, supra*, 221 Cal.App.3d at 1185. Here, however, though taking the hospital's action to have involved a choice between particular physicians in which Petitioner was rejected because he was no longer the "appropriate" person for the radiology department (Opn., p. 6), the Court of Appeal held the action entirely exempt from *any* requirement of fair procedure.

Thus, the Court of Appeal here has, through the extension of the fictional reasoning of such cases as *Centeno* and *Mateo-Woodburn*, enforced Respondent hospital's forfeiture of Petitioner's vested property right in his staff privileges without due process of law, in violation of the Fourteenth Amendment to the United States Constitution. *Shelley v. Kraemer* (1948) 334 U.S. 1. As in *Shelley*, Petitioner, a black physician, has asserted that Respondent acted on racial motivation to deprive him of his property rights, and the Court of Appeal here, through is fictional findings that Respondent did not terminate Petitioner's staff privileges, and that Petitioner was not entitled to a hearing, has validated that deprivation.

Earlier uses of fiction as the basis for forfeiture, as in outlawry and corruption of blood, were barred by the Constitution from the outset. Here a novel use of fiction for the purpose of validating the forfeiture of a physician's vested property and liberty rights in his privileges compels the application of the *Shelley*. (Carl Joachim Friedrich, "Confiscations," *Encyclopedia of the Social Sciences*, [1931] 1st ed., vol. 4, pp. 183-187; Blackstone, *Commentaries on the Laws of England*, [1916] vol. II, book 4, p. 2625, note 3.)

Ironically, if the Court of Appeal had applied the requirements hat such cases as *Centeno* and *Mateo-Woodburn* establish for quasi-legislative decisions (as at one point it suggests that it does, Opn., pp. 26-27), Respondents' conduct could not have *met even that more relaxed* standard, for they make it clear that such action *must not* be targeted at a particular physician.

Here, Respondents' every action was targeted at ousting Petitioner. They started with efforts to remove Appellant from board membership behind his back (CT 1063-66), and included stacking the committee charged with finding a replacement with a majority of members biased against him (Forrester Depo., Vol. 1, p. 159, CT 1686). They structured the committee so that almost its entire membership interlocked and overlapped with that of the NME Board of Governors and Executive Committee (see CT 1064, 1070-71). They excluded Petitioner from the meeting at which the critical decision was made against him (AOB 15-16), among many others. In the words of the court in *Rosenblitt v. Superior Court* (1991) 231 Cal.App.3d 1434 at 1448, the hospital was "dedicated to removing ... rather than providing a physician with a fair opportunity to defend" himself.

This case, then, offers a particularly forceful demonstration of how exclusive contracts are increasingly being used to defy and sap the vitality of the protections

this Court has given physicians against arbitrary loss of privileges.

The CMA and CAHHS have already stated the need for precautions against the dangers which exclusive contracts pose to the guarantees of fair peer review which doctors believe were made in good faith, culminating in the CMA model by-law requiring a hearing whenever a physician is adversely affected by the institution, continuation or transfer of exclusive contracts. But the issue raised here is not solely one of interest to physicians. Business and Professions Code § 809, (mandated by 42 U.S.C. § 11101) states it to be the public policy of California that fair peer review for physicians is "essential to preserving the highest standards of medical care," while the lack of it "results in harm to both patients and healing arts practitioner by limiting access to care."

* * *

Even Respondent hospital's by-laws reflect an understanding that the form of the privileges is worthless without their substance. They protect, not merely the privileges as such, but their *exercise* (By-Laws of the Medical Staff of Doctor's Hospital of Montclair, ¶ 7.1, Exh. 30 in Volume 2 of Response to Motion for Summary JT).

If hospitals continue to use exclusive contracting to deprive physicians of the right to exercise their privileges without the fair procedures mandated by this Court and the Legislature to protect physician's property rights in those privileges, the body of law requiring those procedures will gradually become no more than an empty promise in those departments, such as radiology, anesthesiology and emergency medicine, where exclusive contracts have become common.

By grating review here, and holding that hospitals must not use exclusive contracts to deprive physicians of the substance of their privileges without fair peer review, this Court can halt that law-decaying process.

CONCLUSION

The opinion below (Appen., p. 34) stated that the appeal here is "perilously close" to being frivolous. Only a court willing to indulge in fictions which take the empty form of privileges for their substance could regard it as frivolous to assert, as Petitioner does here, that a radiologist is deprived of his vested property right to practice medicine at a hospital when he is denied access to the radiology equipment.

Once it is clear that the Court of Appeal here has followed and exaggerated a questionable line of decisions to justify the surreptitious destruction of the physician's privileges which this Court and other California courts have so often stated to be fundamental — vested property rights — there can be no doubt that the appeal is exceptionally meritorious. In it, Petitioner seeks only to invoke the protection of the body of law this Court has created to protect his privileges and those of other physicians, and to vindicate that body of law against a countertrend which threatens to rob it of its vitality. The appeal therefore requires this Court's right-saving intervention.

* * *

APPENDIX B

BEST AVAILABLE COPY

EXCERPTS FROM REPLY TO ANSWER TO PETITION FOR REVIEW

* * *

II.

RESPONDENTS MISSTATE THE FACTS TO MAKE IT APPEAR THAT PETITIONER IS COMPLAINING ABOUT THE FAILURE TO RENEW AN EXCLUSIVE CONTRACT.

* * *

That is not so. Petitioner does not assert any rights under the expired contract, but that his property right to maintain his hospital staff privileges remain unimpaired except in accordance with due process of law. The 1985 contract gave Petitioner the status of "Physician Advisor" and the duties attendant to it (CT 793, et seq.), but it was his status as a member of the hospital staff with full staff privileges which gave him the right to use the radiological equipment and provide radiology services at the hospital, and the termination of the contract had no impact on that status.

Respondents also assert disingenuously that Petitioner had an exclusive right to provide services in Respondent hospital's radiology department between 1977 and 1987 under a series of written contracts "all following *almost* identical form" (APR 4; emphasis added).

Respondent is, however, well aware that the 1985 contract between Petitioner and Respondent hospital was crucially different from those which came before it, in that it did not give Petitioner exclusivity of use of the radiology facilities as the previous contracts had (see PRH 2-3).

While Petitioner's 1977 and 1980 contracts stated that Appellant was not to suffer anyone else to use *or* occupy the facilities (CT 833, 839), the 1985 contract presented to him by Respondent stated only that he should not suffer anyone else to *occupy* them (CT 808), omitting exclusivity of *use*.

That Respondent intended this change in the contract language to have substantive force is further shown by the fact that, as noted, Appellant's title as stated in the contract was changed from "Director and Manager" in 1980 (CT 834) to "Physician Advisor" in 1985 (CT 793). There was further evidence of the significance of this elimination from the contract of exclusivity of use in the Layne-Smith memorandum, which demonstrates Respondent's concern about the anti-trust implications of exclusivity in 1985 (Response to Summary Judgment Motion, Vol. 2, Exh. 5).

III.
PETITIONER ASKS THIS COURT TO ENSURE, IN THE WORDS OF THE CMA'S WARNING, THAT EXCLUSIVE CONTRACTS CANNOT BE "USED AS A VEHICLE TO PREEMPT MEDICAL STAFF PEER REVIEW."

Respondents' claim that Petitioner asks this Court to prohibit hospitals from making exclusive contracts (APR 4) is baseless. The Petition focuses on the way in which exclusive contracting deprives physicians of the use of their privileges without resort to the due process protection this Court and Courts of Appeals following it have established for physicians' privileges in such cases as *Anton v San Antonio Community Hospital, supra*, 19 Cal.3d 802; *Westlake Commuity Hospital v. Superior*

Court, supra, 17 Cal.3d 465; *Miller v. Eisenhower Medical Center, supra*, 27 Cal.3d 614; *Ascherman v. San Franciso Medical Society* (1974) 39 Cal.App.3d 623; *Ascherman v. Saint Francis Memorial Hospital* (1975) 45 Cal.App.3d 507; *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648; and, *Bergeron v. Desert Hospital Corp.* (1990) 221 Cal.App.3d 146.

Here, the impact of exclusive contracting on staff privileges is shown in its gravest form: Respondent hospital entered into its exclusive contract with Dr. Shapiro as the means of implementing its deliberate effort to oust Petitioner from the hospital (PR 9, CT 1063-66, 1070-71; Forreter Depo., Vol. 1, p. 159; CT 1686, 1070-71; AOB 15-16), depriving him entirely of the ability to practice his specialty of radiology there (PR 6). He was thus deprived of the right to *exercise* his privileges granted by the hospital by-laws (PR 11-12) and guaranteed by the jurisprudence of this Court without the benefit of the quasi-judicial hearing which that jurisprudence requires, and indeed, without the benefit of common law fairness or any by-law prescribed procedure.

* * *

Respondents contend that Petitioner's claim to a "property right or interest in the diagnostic equipment of the Hospital" must give way before the "long line of authority" which permits hospitals to enter into exclusive agreements (APR 5).

Petitioner *does* have a property right in the diagnostic equipment at Respondent hospital, because the exercise of his staff privileges at the hospital necessarily entails the use of that diagnostic equipment, and he has a vested property right in those privileges. Under the decisions of this Court, Respondent hospital is the trustee of a public trust to protect those privileges and their use, and to ensure that he is not deprived of them, and that his use

of them is not impaired, except in accordance with due process of law.

Further, the cases in Respondents' supposed "long line" of authority, of which Respondents cite *Blank v. Palo Alto-Stanford Hospital* (1955) 234 Cal.App.2d 377, *Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal.App.3d 368, *Centeno v. Roseville Community Hospital* (1979) 107 Cal.App.3d 62, and *Redding v. St. Francis Medical Center* (1989) 208 Cal.App.3d 98 (APR 5-6), do not give the decision of the Court of Appeal below the kind of unequivocal support Respondents claim for them.

Thus, the hospital's fiduciary duty to protect the physician's privileges was not even at issue in *Blank*; the *Lewin* court found the procedure there, including notice and an opportunity for the physician to be heard, to be fair, and took into account the fact that the plaintiff's loss of the ability to exercise his privileges had no economic impact on him (82 Cal.App.3d 368, 388, 392). *Centeno* did not involve a termination such as that imposed here, but a physician's own decision to leave a partnership, making him an outsider applying for staff membership (107 Cal.App. 62, 66-67), and the court there found that the hospital had gone through an appropriate quasi-legislative process before closing its radiology department (107 Cal.App.3d 62, 73-74). The *Redding* court also found appropriate quasi-legislative action and, in addition, made the point that such a process does not require a quasi-judicial hearing because it is not "directed specifically toward the exclusion of a particular physician" (208 Cal.App.3d 98, at 104).

Here, of course, the evidence shows that Respondent hospital's action was aimed at a particular physician: Petitioner (see PR 9; CT 1063-66, 1070-71; Forrester Depo., Vol. 1, p. 159; CT 1686, 1070-71; APB 15-16). Further, the fact that Respondent hospital's claim to

have exercised "administative discretion" in entering the exclusive contract with Dr. Shapiro was based solely on Dr. Forrester's conclusory declaration (Opn., p. 11-12) is a virtual admission that there was no quasi-legislative process here.

The danger of this line of cases is that it can be interpreted, as the Court of Appeal interpreted it here, to support the *fiction* that a physician's privileges remain unscathed when a hospital uses an exclusive contract to bar that physician in whole or part from the practice of his specialization at the hospital PR 4).

When that fiction is used, as it was here, to allow a hospital to use the device of exclusive contracting to deprive a physician of the use of his privileges *unchecked by any requirement of fair procedure* (PR 8), and despite Petitioner's showing that he was personally targeted for removal (see PR 9, CT 1063-66, 1070-71, Forrester Depo., Vol. 1, p. 159, CT 1686, 1070-71, AOB 15-16), it can only result in the *effective nullification* of the due process and common law fairness protection this Court has established for hospital staff privileges in such cases as *Anton v. San Antonio Community Hospital, supra*, 19 Cal.3d 802; *Westlake Community Hospital v. Superior Court, surpa*, 17 Cal.3d 465; and, *Miller v. Eisenhower Medical Center, supra*, 27 Cal.3d 614. This Court must grant review here to ensure their continued vitality.

The question put by the Petition, then, is whether the "long line of authority" which Respondents claim to support the hospital's right to enter into exclusive contracts can also justify a hospital's use of exclusive contracts to evade their fiduciary responsibilities to protect physicians' privileges in accordance with due process of law.

Ironically, Respondents end their argument with a repetition of the claim that Petitioner "can still exercise

his medical staff membership and clinical privileges at Respondent Hospital" (APR 9).

That claim is belied by the record.

Respondents do not explain how Petitioner, as a radiologist, can still exercise his privileges when, as the record shows, Respondent hospital prevents him from using the X-ray equipment, prevents him from doing diagnostic studies (Jenkins Depo., Vol. 1, p. 92) and more generally prevents him from providing either "outpatient or inpatient radiological services" at Respondent hospital (CT 1117).

Respondents' claim that Petitioner "can still exercise" his privileges at Respondent Hospital is patently false. The only explanation for it is that Respondents continue to insist that Petitioner retains his privileges and the right to "exercise" them at Respondent hospital in some formal, fictional sense, though Respondent hospital has barred him from the use of the very equipment necessary to the practice of his specialization.

It is precisely the fictive thinking embodied in Respondents' closing statement which this Court must confront if it is to maintain the integrity of its decisions in *Anton v. San Antonio Community Hospital, supra*, 19 Cal.3d 802; *Westlake Community Hospital v. Superior Court, supra*, 17 Cal.3d 465; and, *Miller v. Eisenhower Medical Center, supra*, 27 Cal.3d 614. Respondents' own words demonstrate that granting review here will be an excellent means of doing so.

* * *

APPENDIX C

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EXCERPTS FROM OPPOSITION TO MOTION FOR SUMMARY JUDGMENT/ADJUD. OBJECTIONS TO EVIDENCE DECLARATIONS, COUNTERSTATEMENTS; SEPARATE STATEMENT OF DISPUTED FACTS AND ISSUES; MEMORANDUM OF POINTS AND AUTHORITIES; REQUEST FOR SANCTIONS

[Filed in San Bernardino Superior Court, Case No. RCV 470-45, on May 1, 1991, CT 895 lines 21-27]

* * *

Plaintiff's : . . . .

(3) Opposition to Defendants' Motion for Summary Adjudication or Summary Judgment: Plaintiff's separate statements showing that each of Defendants' facts or issues is irrelevant, untrue, and involves substantial dispute.

* * *

[CT 957 lines 2-20]

REFUTATION:

Defendants are not entitled to judgment or adjudication.

Plaintiff has declared, in Answers to Interrogatories, as follows:

Page 2: "He along with the other member physicians was under the protection of the fiduciary duties owed to him as a member of the hospital and holder of clinical privileges. He was also under the protection of the medical staff bylaws and of the "due process" standards which the corporate defendants have admitted are built into the bylaws. Document 25B, Agreement of Dec. 1, 1980, clause Nineteenth. He and the other staff

members were also under the protection of the NME Corporate Bylaws such as Article VIII Section 7 which here prevents the termination of a physician-NME service contract from terminating that physician's privileges. Document 76. [Exhibit 17 hereof]

Page 16: The "... termination of plaintiff was summary: defendants permitted no hearing or other compliance with bylaw or due process or fiduciary obligations.

* * *

[CT 958 lines 23-28; 959 lines 1-28]

Page 59: "4. Forrester promised tenure and bylaw protection to plaintiff in late 1986, and plaintiff relied by remaining; details follow:

"(a) In 1980 an agreement by NME with plaintiff included a provision that in the event that the quality of services of the physician be challenged, plaintiff would be entitled to proceed under the bylaws and under the due process protection afford thereby — irrespective of other proceedings such as within the Board of Governors. The provision admits that plaintiff was under bylaw protection.

"That paragraph, number 19 of the 1980 instrument also confirms that the defendant NME's bylaws have a due process quality.

"(b) when the 1985 "agreement" was drafted by NME, that entire Paragraph Nineteen was omitted. Plaintiff protested. Forrester promised that he would have the paragraph reinserted. A year passed. No word on the matter was heard. Meanwhile plaintiff was practicing and directing radiology in the Department with no contract at all, but simply on the strength of his clinical privileges and of an implied agreement which formed in consequence of the circumstances.

"(c) when Forrester at last returned with the instrument, nothing had been added. The due process clause was still omitted. Plaintiff again objected. Forrester told plaintiff to pay no heed to that omission; he assured and represented to plaintiff that irrespective of any instrument, his position and post were secure and were protected by the bylaws. Plaintiff believed the assurance and representation — and believed that his was a career-long situation — thus confirmed to him by Forrester — and plaintiff relied thereon by remaining."

"5. The Medical Staff Bylaws protect every other physician and hospital member and grantee of clinical privileges.

"6. The NME corporate bylaws protect plaintiff against loss of clinical privilege in the circumstance of an expiration.

* * *

[CT 995 lines 3-12]

There are many other issues that . . . require and merit trial.

As examples — one disputed issue under each of the six causes of action of the attached Amended Complaint (in Volume Two): 1--Whether the property and liberty right that is owed by the hospital-as-fiduciary to its physician-hospital member is deemed to be protected where the hospital refrains from striking his clinical privileges from his file but ousts him from the department so that he can no longer practice or exercise those privileges.

* * *

[CT 1018 lines 2-4]

The defendants' motion for summary judgment and its several motions for summary adjudication should be denied.

* * *

APPENDIX D

BEST AVAILABLE COPY

EXCERPTS FROM PLAINTIFF'S RESPONSE TO OBJECTIONS TO PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JT. ABBREVIATED SEPARATE STATEMENT, ETC.

[Filed in San Bernardino Superior Court, Case No. RCV 470-45, on May 28, 1991, CT 1349 lines 21-25]

IN RESPONSE TO DEFENDANTS' OBJECTIONS:

Responding to Defendants' objection as to form, Plaintiff adds a clarifying and abbreviated response in separate statement form using columns as now prescribed by the local rules.

* * *

[CT 1367 lines 1-12]

PLAINTIFF'S SEPARATE STATEMENT OPPOSING DEFENDANTS' ASSERTION OF "ISSUES UNDISPUTED, UNCONTROVERTED, AND MATERIAL"

FIRST "UNDISPUTED ISSUE": Defendants assert, as if the "issue" were "without substantial controversy," that: "Since the 1985 Agreement between Plaintiff and the Hospital whereby Plaintiff was to act as Director of the Radiology Department expired pursuant to its express terms, Plaintiff cannot assert any cause of action or claim based upon the nonrenewal of the agreement between Plaintiff and Defendant. (Fact Nos. 1-7)"

FIRST "ISSUE": DISPUTED:

* * *

[CT 1370 lines 20-27]

6. PROTECTING PLAINTIFF: The defendants *admit* that the bylaws *protect plaintiff*, as also does the protection of the standard of due process which the bylaws embrace. Exhibit 22; Exhibit 5. Exhibit 3 shows the admission that the bylaws apply to plaintiff and that they embrace the "due process" standard, in Clause Nineteen of the 1980 Agreement between defendant corporations and plaintiff. Leyhe Deposition testimony, pp. 59, 137 et seq.; . . .

* * *

[CT 1371 lines 10-19]

8. NME ADMITS: Forrester and Leyhe admit that the membership and privileges are unalienable and therefore require *adherence* to the rights and requirements of bylaws and due process for any stripping of clinical privileges from a member-physician. National Medical Enterprises and its subsidiary have previously admitted this in the text, referred to above, which they wrote as Clause Nineteenth of the 1980 agreement, Exhibit 3. Answers to Interrogatory #1 pp. 30-31 & Interrogatory #21 p. 66, and Exhibit 25, Exhibit 22 and Exhibit 23.

* * *

[CT 1381 lines 9-18]

k. The defendants knew they were breaking the law, and admitted, effectively, that nothing in that "contract" permitted them to bar plaintiff from Radiology and thus from his privileges. Baldly ***the defendants in the same letter, from Forrester and his assistant Surowitz to plaintiff, on 2-15-87, advise him that they have selected Shapiro, and (in the next paragraph) that plaintiff's privileges are "intact" and could not be removed except by procedures under the bylaws which had not been***

done or activated. (Exhibit 25). The admissions by Messrs Forrester, Surowitz, and Leyhe, that the privileges could not be removed except by full hearing and due process procedures as prescribed, are found not only in that second paragraph, but also in the Leyhe testimony. *Supra* The assertion by the defendants is worse than hollow.

* * *

[CT 1399 lines 13-27; 1400 lines 1-3]

. . . The summary adjudication judgment procedure, inasmuch as it denies the right of the adverse party to a trial, is drastic and should not be used except with great caution. Cf. *Mann v. Cracchiolo* (1985) 38 Cal 3d 18. And the United States Constitution, Amendment 14, itself, becomes part of the caution, by its provision of the ancient right: ". . . nor shall any State deprive any person of . . . liberty or property, without due process of law." *Logan v. Zimmerman Brush Co.*, 455 US. 422 (1982), including the right to and protection of a trial — a right reaching all the way back to Article 39 of Magna Carta. The affidavits of the moving party should be strictly construed, and those of the opponent liberally construed. Any doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. *Fragomeno v. Insurance Co. of the West* (1989) 207 Cal.App.3d 822. Determination of a motion for summary judgment necessarily begins with reference to the issues framed by the pleadings. *Twaite v. Allstate Ins. Co.* (1989) 216 Cal.App.3d 239. . . .

APPENDIX E

BEST AVAILABLE COPY

EXCERPTS FROM VOLUME TWO OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION DECLARATION OF PLAINTIFF — REGARDING EXHIBITS COMPILED AND ATTACHED BENEATH THE DECLARATION

[Filed in San Bernardino Superior Court, Case No. RCV 470-45, dated April 30, 1991, CT 1405 lines 21-27; 1406 lines 1-23]

DECLARATION OF PLAINTIFF LAWRENCE F. BROWN, M.D., IN REGARD TO EXHIBITS REFERRED TO IN VOLUME ONE AND COMPILED HERE.

I, LAWRENCE F. BROWN, M.D. declare and state as follows:

I am the plaintiff in the above-entitled case.

I received the following Exhibits on approximately the dates shown thereon. They are genuine copies of the originals, viz.:

Exhibit 2, documents granting me clinical privileges;

Exhibit 3, the Agreement between defendants and myself dated December 1, 1980;

Exhibit 5, the memorandum from Chief Corporate Council Layne on proscribed activities under the antitrust laws; Mr. Layne addressed it to corporate officer Smith, and copies were directed, as the document shows, to the NME Montclair Hospital Executive Committee. I received it as a member thereof.

Exhibit 6, the Williams letter to Duran. I received a copy of the Williams letter after several conversations with Mr. Williams regarding his recommendation of me;

Exhibit 8, parts of the Craig contract with the Hospital (Forrester's assistant Donna Dye brought it to me; I do not remember the date;

Exhibit 9, the 1985 "contract" purportedly between myself and the corporate defendants; Forrester brought it to me first on December 1, 1985;

Exhibit 11, the NME corporate Bylaws, which I received at a Board of Governors meeting on the approximate date when the set was issued;

Exhibit 16, the termination letter from Forrester to me; Exhibit 25, a letter from Forrester, signed by his assistant Surowitz, to me, assuring me that my privileges were intact;

* * *

[CT 1407 lines 1-7 and lines 16-21]

Exhibit 30, the Medical Staff Bylaws, which I received at one of the Executive Committee Meetings. Being president, I signed the bylaws, as my signature at the end shows.

Exhibit 35, the Board Minutes of November 5, 1985, which showed my reelection to the Board for a third term. I did not know at the time that Forrester had urged that I not be reelected.

* * *

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Executed this 30th day of April, 1991.

/s/ LAWRENCE F. BROWN M.D.

APPENDIX F

BEST AVAILABLE COPY

EXCERPTS FROM DECLARATION OF LAWRENCE F. BROWN, M.D.

[Filed in San Bernardino Superior Court, Case No. RCV 470-45, dated May 12, 1990, CT 1420 lines 23-25]

I, Lawrence F. Brown, M.D., declare:

* * *

[CT 1428 lines 8-15]

15. Referring to page 46 of my Opposition to the Motion for Summary Judgment, the wording of Clause Nineteenth of the 1980 Agreement regarding the bylaws, represents that I was under the protection of the bylaws and that the bylaws incorporate the due process standard. I knew of this representation and relied on it, and also on Forrester's assurance and promise that I was secure and had the protection of those bylaws, and could not be removed without action under the bylaws and thus had tenure.

* * *

[CT 1434 lines 9-16]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 12th day of May, 1990, at Los Angeles.

/s/ Lawrence F. Brown, M.D.
Lawrence F. Brown, M.D.
Declarant

APPENDIX G

BEST AVAILABLE COPY

EXCERPTS FROM NOTICE OF LODGING OF CERTIFIED COPIES OF DEPOSITIONS

[Filed in San Bernardino Superior Court, Case No. RCV 470-45, dated May 1, 1991, CT 903 lines 19-28]

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that certified copies of the original of the depositions of Kevin Jenkins, M.D. Volumes I and II, and of Richard Forrester, Volumes I and II, and William Leyhe, are today lodged with the court and the originals of that deposition will be available at the time of the hearing of the above motion.

DATED: MAY 1, 1991

Respectfully submitted,

/s/ Gerald H. Gottlieb
Gerald H. Gottlieb,

Attorney for Plaintiff

APPENDIX H

BEST AVAILABLE COPY

COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

LAWRENCE F. BROWN, M.D.,
Plaintiff,

vs.

NATIONAL MEDICAL ENTERPRISES, INC.; NME HOSPITALS, INC. dba Doctors' Hospital of Montclair; KEVIN JENKINS, D.O., DOES 1 through 10, inclusive; ROES XI through XX, inclusive,

Defendants.

Docket No. 4th Civ. E010073
Super. Ct. No. RCV 470-45

NOTICE OF LODGING OF DOCUMENTS
IN RE ORAL ARGUMENT AND
DECLARATION IN SUPPORT THEREOF

TO ALL INTERESTED PARTIES HEREIN AND TO THE ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that the documents listed hereinabove are being submitted for lodging in support of plaintiff's oral argument presently scheduled in this matter in the above-entitled Court for February 2, 1994. These documents are being lodged with this Court because of the refusal of the superior court to transmit them to this Court under Rule of Court 10(d) as described in the attached Declaration of Lisa L. Ervin:

1. "Volume Two of Response to Motion for Summary JT Table of Exhibits;"

2. Volume I of Transcript of Deposition of Kevin Jenkins, D.O., taken on Nobemnber [*sic*] 15, 1988;

3. Volume II of Transcript of Deposition of Kevin Jenkins, D.O., taken on Nobemnber [*sic*] 2, 1989;

4. Volume I of Exhibits to Deposition of Kevin Jenkins, D.O., taken on Nobemnber [*sic*] 15, 1988;

5. Transcript of Deposition of William Lehye, taken on November 22, 1989; and,

6. Volume II of Transcript of Deposition of Richard G. Gorrester, [*sic*] taken on October 31, 1989.

Copies of these documents are in the possession of all parties to this action, and so are not served with this notice.

Dated: January 31, 1994

/s/ Gerald H. Gottlieb
GERALD H. GOTTLIEB,
Attorney for Plaintiff and Appellant
LAWRENCE F. BROWN, M.D.